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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 469

GEORGE L. SHEARER, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 19, 1931

CERTIORARI GRANTED NOVEMBER 30, 1931

(36,283)

(36,283)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1931

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 29228.

GEORGE L. SHEARER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:
For Taxpayer: John A. Kratz, Esq., C. H. Butler, Esq.
For Commissioner: L. A. Luce, Esq.

1927.

June 21. Petition received and filed. Taxpayer notified.
" 22. Copy of petition served on General Counsel.
Aug. 19. Answer filed by G. C.
" 22. Copy of answer served on taxpayer. General Calendar.

1929.

Jan. 31. Hearing set Feb. 26, 1929.
Feb. 21. Motion to consolidate with docket 29229 and to continue to day calendar of March 19, 1929, filed by taxpayer. Granted to March 19, 1929.

[fol. 2]

Mar. 19. Hearing had before Mr. Green on the merits. Briefs due in 30 days. Reply briefs due in 10 days. Submitted to Mr. Green.
" 22. Transcript of hearing March 19, 1929, filed.
Apr. 17. Brief filed by G. C.
Nov. 30. Decision entered. Wm. R. Green, Div. 13.
" 30. Findings of fact and opinion rendered, Wm. R. Green, Div. 13. Judgment will be entered for the respondent.

1930.

May 14. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error and proof of service filed by taxpayer.
" 14. Præcipe with proof of service filed.

Now, June 11, 1930, the foregoing Docket Entries, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed June 21, 1927

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated April 23, 1927, bearing symbol numbers IT:PA:3-60D-RMH, and as a basis for this proceeding alleges as follows:

1. The petitioner is an individual and resident of New York City with his offices located at No. 45 Wall Street, New York City, New York.

2. The notice of deficiency, a copy of which is hereto attached and marked Exhibit "A", was mailed to the petitioner on April 23, 1927.

3. The taxes in controversy are income taxes for the calendar year 1924. The amount of deficiency claimed by the Commissioner is $8,488.18. The amount of tax in dispute is $6,811.08.

[fol. 4] 4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in his determination that the twenty-five per cent reduction provided by title XII of the Revenue Act of 1924, does not reduce the 1924 tax payable in 1925, of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

(b) The Commissioner erred in his determination that the provisions of title XII of the Revenue Act of 1924, allowing a credit or refund of twenty-five per cent of the tax shown by 1923 returns did not reduce the rates for 1923, within the meaning of section 207 (b) of the Revenue Act of 1924.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

The petitioner filed an income tax return for the calendar year 1924. The principal part of his income was his distributive share as a partner of the law firm of Stewart & Shearer. The partnership made a return upon the basis of a fiscal year ending on April 30, 1924. The petitioner included in his return for the calendar year 1924, his distributive share of the partnership profits for the fiscal year of the partnership ending on April 30, 1924. The net income of the petitioner for the calendar year [fol. 5] 1924, has been determined to be $103,613.53, of which amount $67,462.38 represents that part of the partnership profits attributable to 1923. The tax on the income attributable to 1924, has been determined to be $3,071.67. The tax on $67,462.38 representing partnership profits attributable to 1923 and taxable at rates in effect for 1923, has been determined to be $27,244.32. The petitioner contended before the Treasury Department that the provisions of title XII of the Revenue Act of 1924, allowing a credit of twenty-five per cent of the tax shown by the 1923 return reduced the rates for 1923 and that the tax of $27,244.32 computed by the Commissioner on income atributable to 1923, should be reduced by twenty-five per cent or an amount of $6,811.08.

Wherefore the petitioner prays that this Board may hear the proceeding and that the Board decree:

1. That the effect of title XII of the Revenue Act of 1924, allowing a credit or refund of twenty-five per cent of the tax shown by 1923 returns was to reduce the rates for 1923 within the meaning of section 207 (b) of the Revenue Act of 1924.

2. That the petitioner is entitled to have the proposed additional tax reduced by the amount of $6,811.08 repre- [fol. 6] senting twenty-five per cent of the tax on income attributable to 1923.

Harry J. Campaign, Counsel for Petitioner, 45 Wall Street, New York City. John A. Kratz, Counsel for Petitioner, 1537 Eye Street N. W., Washington, D. C.

Duly sworn to by George L. Shearer. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:PA:3-60D. RMH.

April 23, 1927.

Mr. George L. Shearer, 45 Wall Street, New York, New York.

SIR: The determination of your income tax liability for the years 1923 and 1924, as set forth in office letter dated April 11, 1927, disclosed a deficiency in tax of $8,488.18 for 1924 and an overassessment of $1,468.18 for 1923, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file [fol. 8] a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:3-60D-RMH. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by (Signed) C. R. Nash, Assistant to the Commissioner.

Inclosures: Statement, Form A, Form 882.

[fol. 9] Statement

IT:PA:3-60D. RMH.

April 23, 1927.

In re Mr. George L. Shearer, 45 Wall Street, New York, New York

Year	Deficiency in tax	Overassessment
1923	.....	$1,468.18
1924	$8,488.18	.....
Total	8,488.18	1,468.18

The report of the Internal Revenue Agent in Charge at New York, New York, dated March 11, 1927, has been reviewed and approved by this office.

The statements contained in your letter dated February 24, 1927, have been given careful consid-ration by this office. However, on the basis of the evidence on file the determination of your tax liability as indicated above appears to be correct.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for [fol. 10] another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded since a portion may be an assessment which has been entered but not paid.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Now, June 11, 1930, the foregoing Petition, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed Aug. 19, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Rev-
[fol. 11] enue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Respondent admits that the petitioner is an individual with a principal place of business at No. 45 Wall Street, New York City, New York.

2. Respondent admits that a notice of deficiency was mailed to the petitioner on April 23, 1927.

3. Respondent admits that the taxes in controversy are income taxes for the calendar year 1924 in an amount not less than $6,811.08.

4. Respondent denies that he erred in determining the tax set forth in said notice of deficiency and further denies that he erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. Respondent denies that the petitioner is entitled to have the proposed additional tax for the year 1924 reduced by the sum of $6,811.08, as alleged in paragraph 5 of the petition.

6. Respondent denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's appeal be denied.

A. G. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel: L. A. Luce, Special Attor-
[fol. 12] ney, Bureau of Internal Revenue.

Now, June 11, 1930, the foregoing Answer, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Titles omitted]

STIPULATION AS TO FACTS—Filed Mar. 19, 1929.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following is a [fol. 13] statement of all the material facts involved in the above-entitled appeals:

I. That George L. Shearer in an individual and a resident of New York, with his offices located at 45 Wall Street, New York, New York.

II. That William A. W. Stewart is an individual and a resident of New York, with his offices located at 45 Wall Street, New York, New York.

III. That the partnership of Stewart & Shearer made and filed a return on the basis of a fiscal year ended April 30, 1924, and that the partnership was composed of George L. Shearer and William A. W. Stewart.

IV. That George L. Shearer made and filed his return on the basis of a calendar year.

V. That William A. W. Stewart made and filed his return on the basis of a calendar year.

VI. That the tax as computed by the respondent on the income of George L. Shearer for the calendar year 1924 is as follows:

Total net income		$36,151.15
Income subject to surtax		36,151.15
Less: Exception	$2,900.00	
Dividends	4,025.67	
		6,925.67
Income subject to normal tax		$29,225.48
[fol. 14] Tax at 2% on $4,000.00		80.00
Tax at 4% on $4,000.00		160.00
Tax at 6% on balance $21,225.48		1,273.53
Surtax		1,558.14

(a) Normal tax @ 8% on $67,175.05 1923 income		5,374.00
(b) Surtax on $67,462.38 1923 income		21,870.32
Total tax		30,315.99
Credits: 25% of normal tax on earned income	51.00	51.00
Total tax assessable		30,264.99
Tax previously assessed		21,776.81
Additional to be assessed		$8,488.18

NOTE.—Paragraphs (a) and (b) represent the tax computed on that portion of the partnership income allocated to the eight months falling within the year 1923.

VII. That the tax as computed by the respondent on the income of William A. W. Stewart for the calendar year 1924 is as follows:

Total net income		$19,702.96
Income subject to surtax		19,702.96
Less: Exemption	None	
Dividends	$7,697.77	
		7,697.77
Income subject to normal tax		$12,005.19
[fol. 15] Tax at 2% on $4,000.00		$80.00
Tax at 4% on $4,000.00		160.00
Tax at 6% on balance $4,005.19		240.31
Surtax		208.12
(a) Normal tax @ 8% on $71,175.06 1923 income		5,694.00
(b) Surtax on $71,462.39 1923 income		18,038.92
Total tax		$24,421.35
Credits: 25% of normal tax on earned income	90.00	90.00
Total tax assessable		$24,331.35
Tax previously assessed		16,895.64
Additional to be assessed		$7,435.71

NOTE.—Paragraphs (a) and (b) represent the tax computed on that portion of the partnership income allocated to the eight months falling within the year 1923.

VIII. The sole issue in these appeals is whether or not the petitioners are entitled to a reduction of 25% of the tax shown in (a) and (b) of Paragraphs numbered VI and VII.

[fol. 16] IX. That the entire evidence is contained in the foregoing stipulation of fact.

Harry J. Campaign, Counsel for Petitioner. C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for Respondent.

vh-k 3-9-29.

Now, June 11, 1930, the foregoing Stipulation, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 17] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 29,228

GEORGE L. SHEARER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 29,229

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated, November 30, 1929

The provisions of Title XII of the Revenue Act of 1924, do not authorize a 25 per cent. reduction of tax on calendar year 1924 income reported in 1925, but taxable in part at

1923 rates under Section 207(b) of the Revenue Act of 1924. Charles Colip, 5 B. T. A. 123 followed.

C. H. Butler, Esq., for the Petitioners.
L. A. Luce, Esq., for the Respondent.

Findings of Fact and Opinion

[fol. 18] In these proceedings, which have been consolidated for hearing and decision, the petitioners seek a redetermination of their income tax liabilities for the calendar year 1924, for which year the respondent has determined a deficiency as to George L. Shearer in the amount of $8,488.18, of which $6,811.08 is in controversy, and as to William A. W. Stewart in the amount of $7,435.71, of which $5,933.23 is in controversy.

The sole question involved in both proceedings is whether the 25 per cent. reduction provided by Title XII of the Revenue Act of 1924, reduces the calendar year 1924 tax payable in 1925, of an individual partner whose taxable income for the calendar year 1924 is made up in part of a share of the income of a partnership whose fiscal year ended April 30, 1924.

The facts were stipulated.

Findings of Fact

The petitioners are individuals and residents of New York, with their offices located at 45 Wall Street, New York City. They made and filed their individual income tax returns on the basis of a calendar year.

The partnership of Stewart & Shearer, whose members are the petitioners herein, made and filed a partnership return of income on the basis of a fiscal year ended April 30, 1924.

The respondent determined the net income of petitioner Shearer for the calendar year 1924, to be $103,613.53 of which amount $67,462.38 represents that part of the net [fol. 19] income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924 was $3,071.67, and that the tax on the income attributable to 1923 was $27,244.32.

The respondent determined the net income of petitioner Stewart for the calendar year 1924, to be $91,165.35, of which

amount $71,462.39 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924, was $688.43, and that the tax on the income attributable to 1923 was $23,732.92.

Opinion

GREEN:

The petitioners contend that under Title XII of the Revenue Act of 1924, the respondent should have reduced the tax on the income attributable to 1923 by 25 per cent. As previously stated, the amounts of taxes here in controversy are $6,811.08 as to Shearer, and $5,933.23 as to Stewart, which represents 25 per cent. of the amounts of $27,244.32 and $23,732.92 respectively, set out in our findings as representing the tax on each of the petitioner's share of partnership net income attributable to the year 1923.

We have hold in a long list of decisions following Charles Colip, 5 B. T. A. 123, that the statute did not permit the 25 per cent. reduction here contended for where the facts are such as are present in the instant proceedings. The respondent's determination must, therefore, be approved. [fol. 20] See also Anna M. Tighe, et al., 12 B. T. A. 670, which case is now pending before the Circuit Court of Appeals for the Seventh Circuit, October term 1929, as Docket No. 4188.

Judgment will be entered for the respondent.

Now, June 11, 1930, the foregoing Findings of Fact and Opinion, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 21] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 29228

GEORGE L. SHEARER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated November 30, 1929, it is

Ordered and decided that there is a deficiency of $8,488.18 for the year 1924.

Enter.

(Signed) William R. Green, Jr., Member United States Board of Tax Appeals.

A True Copy. Teste:

B. D. Gamble, Clerk U .S. Board of Tax Appeals. (Seal.)

Now, June 10, 1930, the foregoing Decision, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 22] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed May 14, 1930

C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C., attorney for respondent:

SIR: Please take notice that on the 14th day of May, 1930, the undersigned will present to this Board and file with the Clerk thereof the petition of George L. Shearer, a copy of which is enclosed herewith for the review by the United States Circuit Court of Appeals for the Second Circuit of the final order and decision of the Board, in the above-entitled proceeding entered upon the records of said Board on the 30th day of November, 1929.

Dated New York, N. Y., May 14th, 1930.

Harry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

[fol. 23] Copy of the within notice and copy of the petition for review is hereby accepted this 14th day of May, 1930.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE L. SHEARER, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION FOR REVIEW—Filed May 14, 1930

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petitioner is aggrieved by the decision of the United States Board of Tax Appeals rendered against him on November 30, 1929, in the case of his appeal to said board from a deficiency in income taxes for the year 1924 deter- [fol. 24] mined by the Commissioner of Internal Revenue, which appeal was numbered 29228 on the docket of the board and respectfully submits this petition for review thereof by the Circuit Court of Appeals for the Second District.

I

Statement of the Nature of the Controversy

The petitioner on June 21, 1927, duly filed with the United States Board of Tax Appeals in pursuance of the provisions of the Revenue Act of 1926 a petition requesting a redetermination of the deficiency in 1924 income taxes against him amounting to $8,488.18. Of this proposed additional tax $1,677.10 results from adjustments in return filed by the petitioner to which no objection was made. The balance of the proposed tax, amounting to $6,811.08, is the amount of tax in dispute. The principal part of petitioner's income as shown in his 1924 income tax return represents his distributive share as a partner of the law firm of Stewart & Shearer. The partnership made an income tax return on a basis of the fiscal year ending on April 30, 1924. The petitioner included in his individual return for the calendar year 1924 his distributive share of the partnership profits for the fiscal year ending April 30, 1924. Under such conditions the rates of tax for the calendar year during which such fiscal year of the partnership

began applied to that amount of the petitioner's share of partnership profits equal to the proportion which the part [fol. 25] of such fiscal year falling within such calendar year bears to the full fiscal year. The rates af tax for the calendar year during which such fiscal year ended applied to the amount of the petitioner's share of the partnership's net income equal to the portion which the part of such fiscal year ending within such calendar year bears to the full fiscal year. As a result of this two-thirds of the petitioner's share from the partnership profits derived from the fiscal year ending April 30, 1924, was taxable at rates in effect for the calendar year 1923 and one-third at the rates in effect for the calendar year 1924. The net income of the petitioner for the calendar year 1924 has been determined to be $103,613.53, of which amount $67,462.38 represents that part of the partenership profits attributable to 1923. The tax on the income attributable to 1924 has been determined as $3,071.67. The tax on $67,462.38 representing partnership profits attributable to 1923 and taxable at rates in effect for 1923 has been determined by the Commissioner to be $27,244.32.

Section 1200 (a) (Title XII) of the Revenue Act of 1924 reduced the tax on 1923 incomes by providing that any person making a return for the calendar year 1923 was entitled to an allowance by credit or refund of 25% of the amount shown as the tax upon his return. The petitioner contended before the Treasury Department and the Board of Tax Appeals that the provision of Title XII of the Revenue Act of 1924 allowing a credit of 25% shown on the 1923 returns reduced the rates for 1923 and that the tax of [fol. 26] $27,244.32 computed by the Commissioner on the petitioner's income attributable to 1923 should be reduced by 25% or in an amount of $6,811.08.

On August 19, 1927, the respondent filed with the Board of Tax Appeals an answer to the petition, the cause thereby being at issue under the rules of practice of said board. The case was submitted to the board upon an agreed statement of facts. On November 30, 1929, the board handed down an opinion adverse to the petitioner's contentions and held that the provisions of Title XII of the Revenue Act of 1924 allowing a credit of 25% of the tax shown on 1923 returns did not reduce the rates for 1923 and did not reduce the 1924 tax payable in 1925 of an individual partner whose

1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

The petitioner paid the disputed tax under an agreement with the Commissioner of Internal Revenue that it would be refunded in the event of a successful prosecution of the appeal.

II

Designation of Court of Review

Your petitioner believes and avers that errors were committed by the board to the damage and prejudice of the petitioner and desires a review thereof by the United States Circuit Court of Appeals for the Second Circuit within which circuit is located the office of the Collector of Internal Revenue with whom the petitioner filed his 1924 income tax return.

[fol. 27]

III

Assignment of Errors

The petitioner as a basis of review makes the following assignment of errors:

1. The board erred in failing to hold that the effect of Title XII of the Revenue Act of 1924 allowing a credit or refund of 25% of the tax shown on 1923 returns was to reduce the rates for 1923 within the meaning of Section 207 (b) of the Revenue Act of 1924.

2. The board erred in holding that the 25% reduction in tax provided by Title XII of the Revenue Act of 1924 did not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

3. The board erred in failing to allow the petitioner a credit of 25% of the tax on that portion of the partnership income shown on his 1924 return which was attributable to the year 1923 and taxable at rates in effect for 1923.

4. The board erred in rendering a decision for the respondent.

Wherefore the petitioner prays that this honorable court may review the decision of said Board of Tax Appeals

entered herein against him and reverse and set aside the [fol. 28] same and for such other and further relief as to the Court may seem just and proper.

George L. Shearer, Petitioner. Harry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

Duly sworn to by George L. Shearer. Jurat omitted in printing.

Now, June 11, 1930, the foregoing Petition for Review with proof of service thereon, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 29] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PRÆCIPE—Filed May 14, 1930

To C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent.

SIR: Please take notice that on the 14th day of May, 1930, I filed with the Clerk of this Court a præcipe designating the portions of the record to be transmitted to the Circuit Court of Appeals for the Second Circuit on the appeal taken in the above case, a copy of which præcipe is hereby annexed and herewith served on you.

Dated this 14th day of May, 1930, New York City, New York.

Harry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

[fol. 30] Service of the within notice and copy of præcipe is hereby accepted on this 14th day of May, 1930.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE—Filed May 14, 1930

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within the sixty days of the filing of the petition for review in the above stated case, transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit certified copies of the following documents:

[fol. 31] 1. The docket entries of proceedings before the United States Board of Tax Appeals in the above entitled case.

2. Pleadings before the Board.
3. Stipulation setting forth agreed statement of facts.
4. Findings of fact, opinion and decision of the Board.
5. Final order of redetermination.
6. Petition for review.
7. Proof of service and notice of filing petition for review.
8. This designation of record.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Harry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

Now, June 11, 1930, the foregoing Præcipe, with proof of service thereon, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

B. T. A. No. 29228. C. C. A. No. —

GEORGE L. SHEARER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MOTION

Comes now David Burnet as Commissioner of Internal Revenue, by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows to the Court;

That since the filing of the petition for review in the above-entitled cause, Robert H. Lucas, who was at that time Commissioner of Internal Revenue, and who was the respondent at that time in the above-entitled cause, has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted;

That said Robert H. Lucas ceased to be Commissioner of Internal Revenue on August 15, 1930;

That David Burnet was duly ap-ointed as Commissioner of Internal Revenue to succeed the said Robert H. Lucas and has duly qualified as said Commissioner of Internal Revenue;

That on August 20, 1930, David Burnet became Commissioner of Internal Revenue, and ever since that time has been and now is Commissioner of Internal Revenue;

Wherefore, it is accordingly prayed that the above-entitled cause be revived so that this action will be pending against the said David Burnet, as Commissioner of Internal Revenue, and that the said David Burnet, as Commissioner of Internal Revenue, may be substituted as the respondent in this cause for the said Robert H. Lucas, formerly Commissioner of Internal Revenue.

It is further shown to the Court that there is substantial need for so continuing and maintaining this cause because if it is not so continued and maintained, the order of the

United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality, or obtain a refund thereof.

It is also shown to this Court that the said David Burnet, as Commissioner of Internal Revenue, by and through his attorney, has caused to be mailed to the attorney of record for the petitioner in the above-entitled cause a copy of this motion to revive this action in the name of David Burnet, as Commissioner of Internal Revenue, and to have his name substituted as the respondent in this cause.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for David Burnet, as Commissioner of Internal Revenue.

DISTRICT OF COLUMBIA, ss:

C. M. Charest, General Counsel, Bureau of Internal Revenue, being duly sworn, says that he is the attorney for David Burnet, as Commissioner of Internal Revenue, and as such is duly authorized to verify this motion; that he has read the foregoing motion and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as may be stated upon information and belief, and those facts he believes to be true.

C. M. Charest.

Sworn and subscribed to before me this 7 day of Nov., 1930. Marcellette M. Taylor, Notary Public, District of Columbia. My Commission expires March 31, 1935. (Seal of Marcellette M. Taylor, Notary Public, District of Columbia.)

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York,

on the 21st day of November, one thousand nine hundred and thirty—.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

29288

GEORGE L. SHEARER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

A motion having been made herein by counsel for the Respondent to substitute David Burnet, Commissioner of Internal Revenue, in the place and stead of Robert H. Lucas, Commissioner of Internal Revenue, as respondent;

Upon consideration thereof it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. George L. Shearer v. Commissioner of Internal Revenue. Order. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 21, 1930. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM A. W. STEWART, Appellant,

against

COMMISSIONER OF INTERNAL REVENUE, Appellee

GEORGE L. SHEARER, Appellant,

against

COMMISSIONER OF INTERNAL REVENUE, Appellee

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeals from the United States Board of Tax Appeals

Petitions by William A. W. Stewart and George L. Shearer, taxpayers, to review orders of the United States

Board of Tax Appeals, sustaining the action of the Commissioner of Internal Revenue in determining a deficiency in the income taxes of each taxpayer for the year 1924. Affirmed.

Harry J. Campaign, Attorney for Appellants; William A. W. Stewart, George L. Shearer, and Harry J. Campaign, Counsel.

G. A. Youngquist, Assistant Attorney General; Sewall Key and Norman D. Keller, Special Assistants to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue, and J. K. Polk, Special Attorney, Bureau of Internal Revenue, of counsel, for Appellee.

Raymond M. White, Amicus Curiæ.

AUGUSTUS N. HAND, Circuit Judge:

The above appeals were argued together and relate to the income taxes of the appellants who are law partners doing business under the name of Stewart & Shearer. They made and filed their individual returns on the basis of a calendar year, and the additional taxes found against them are for the calendar year 1924. The partnership filed a partnership return on the basis of a fiscal year ending April 30, 1924. The appellants included in their individual returns for the calendar year 1924, their distributive shares of the partnership profits for its fiscal year, thus including eight months of firm profits earned in 1923. The Commissioner correctly found the taxes on income attributable to 1923 at the rates prevailing for that year, but refused to allow the appellants a reduction of 25% of such taxes under Sections 1200 and 1201 (b) of the Revenue Act of 1924. As a result, the appellants say that they have been improperly held for a deficiency in their income taxes to the amount of $6,811.08 in the case of Shearer and $5,933.23 in the case of Stewart. The Board of Tax Appeals affirmed the action of the Commissioner.

The question before us is whether the appellants are entitled to receive a 25% reduction of their income taxes on that portion of the partnership income which was, by Section 207 (b) of the Revenue Act of 1924, taxable at 1923 rates.

Sections 218 (a) of the Act of 1924 provided that persons carrying on business in partnership should be liable for income taxes only in their individual capacity. It re-

quired that, if the income of a partner was computed for a period different from that of the partnership, there should be included in his individual return his distributive share of the net income of the partnership for any accounting period ending within the taxable year upon the basis of which his own income was computed.

In other words, Section 218 (a) required each appellant when he filed his return on March 15, 1925, for the calendar year 1924, to bring in his distributive share of the partnership income for the entire fiscal year that ending April 30, 1924. Thus each return, though for the year 1924, necessarily included income of the partnership for eight months of 1923.

By the Revenue Act of 1924, rates for income taxes were greatly reduced. Section 207 (a) dealt with cases where taxpayers make returns for a year, different from the calendar year, and the rates are changed during the period. It provided that in such cases the tax on the entire income for the fiscal year should be computed at the rate prevailing during the first calendar year and the proportion of the tax which the period in which these rates were in effect bore to the entire fiscal year should be ascertained. To this sum should be added the proper proportion of the tax computed at the rates prevailing during the second calendar year in order to get the total. This section covered individual taxes only, for, by reason of Section 218 (a), supra, individuals, and not partnerships, are liable for income taxes and the return of a partnership is essentially no more than an information return.

The method of calculating the tax upon partnership income to be included in individual returns, in cases where rates have changed and the income has accrued in calendar years having different tax rates, was prescribed by Section 207 (b) of the same Revenue Act. Section 207 (b) applies the 1923 rates to the proportion of the fiscal year of the partnership falling within the calendar year 1923 and applied the 1924 rates to the proportion of the fiscal year falling within the calendar year 1924. For purposes of surtax it places the partnership income subject to the 1924 rates in the lower brackets, and the income subject to the 1923 rates in the higher brackets. In doing this, Congress, so far as possible, effectuated the high sur-taxes of 1923 by

applying them to the proportion of the income allocated to 1923 at the top.

Owing to the surplus in the Treasury in 1923, it was decided to lower income tax rates and it was at first proposed to make the new Revenue Act applicable to 1923 income. But as the bill was not ready for passage until after the returns for 1923 income had been filed, it was thought best to limit the relief to 1923 income to a credit or refund of 25%. Accordingly the following provisions were inserted in the Act of 1924:

"Sec. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return. * * *

"Sec. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such Year) which the portion of such period falling within the calendar year 1923 is of the entire period. * * *"

We think it clear that none of the statutory provisions just quoted afford appellants the relief which they ask. Section 1200 (a) does not, for it only relates to a taxpayer making a return for the calendar year 1923 and Stewart and Shearer each made a return for the calendar year 1924. It allows a 25% credit or refund upon the whole amount properly shown as the tax upon a return for that calendar year, whenever the income may have accrued. Under Sec-

tion 218 (a) taxpayers had to bring in the distributive share of any partnership income for an accounting period of the partnership ending within the taxable year, upon the basis of which the partners' net income was computed. Owing to this later section, as construed by the Department, Stewart and Shearer would have been entitled to a 25% deduction upon income of their partnership accruing during the entire fiscal year from April 30, 1922 to April 30, 1923.

Section 1201 (a) applies only to a taxpayer making a return for a period beginning in 1922 and ending in 1923. If the appellants had been making their individual returns for a period beginning April 30, 1922, and ending April 30, 1923, this section would have applied, but they were making them for the calendar year 1924, and not for a fiscal year.

Section 1201 (b) applies to a taxpayer making a return for a period beginning in 1923 and ending in 1924. The appellants were not making a return for such a period, but for the calendar year 1924. By its terms, Section 1201 (b), as Section 1201 (a), relates only to taxpayers reporting income for a fiscal year different from a calendar year—a situation not involved here. Section 1201 (a) covers only cases where a taxpayer, not a partner, is reporting income under § 207 (a) for a split fiscal year. Under § 207 (a) Section 1201 (b) deducts 25% from the proportion of the tax allotted under § 207 (a) to 1923. Section 1201 (b) is not applicable to a case where partnership income, and not the tax, is allocated between separate years as provided in the case of partnerships by § 207 (b).

The strongest argument for the taxpayers is that Congress intended to allow a general reduction of taxes paid for all income accruing in the year 1923. This prevailed with the Court of Appeals of the First Circuit in White vs. Maddison, 45 Fed. (2d) 335. Congress allowed reductions under § 1200 (a) to those who filed returns for 1923 on a calendar year basis, and under § 1201 (a) and § 1201 (b) to those who filed for 1923 or 1924 on a fiscal year basis. Must we not suppose that it intended to allow a reduction of the tax on an individual who reported for his 1924 return his distributive share of the net income earned partly in 1923?

An affirmative answer to this query seems impossible. In the first place Congress might well have thought that

most partnerships were continuous during the periods covered by the remedial legislation relating to 1923 income and that when a partner whose year for accounting ended in 1923, got a 25% deduction on earnings embracing firm income accruing in 1922, as well as down to the termination of the partnership fiscal year, in 1923, this was sufficient relief from the high tax rates prevailing in 1923. If, however, the contention of the appellants were adopted, such a partner would get not only a deduction on partnership income for a split year beginning in 1922 and ending in 1923, he would also obtain a deduction on partnership income during the remainder of 1923. In other words, in a case like the present, he would get a deduction on twenty months of partnership income.

Another argument even more fatal to appellants' position is that Section 1201 (b), if applicable, would allow a credit or refund of 25% on the proportion of the total tax paid by the reporting taxpayer at 1923 rates which the portion of the period falling within the calendar year bore to the fiscal year of the partnership.

An allowance of 25% of the portion of the tax upon firm income, required by Section 207 (b) to be placed in the higher brackets, and thus to be calculated at the highest rates, would be for a different sum than that allowed by Sec. 1201 (b). In other words, it would not be on two-thirds of the whole tax for the fiscal year as required by Section 1201 (b), but on a tax which two-thirds of the net firm income would yield when placed in the higher brackets.

The difficulties which the position of appellants involves may be further amplified. If the tax is computed under Section 207 (b) the method is for the taxpayer to divide his income into two parts according to the year in which it was earned; the income attributable to 1924 is then put in the lower brackets, and the income attributable to 1923 is put in the next higher brackets.

If the tax is computed under Section 207 (a) the method is for the taxpayer first to consider all his income as earned in 1923, to compute his tax on that basis, and then to take such proportion of the tax as the portion of the fiscal year falling within the calendar year 1923 is of the entire period. Then the taxpayer considers all his income as earned in 1924, computes his tax on that basis, and takes such proportion of the tax as the portion of the fiscal

year falling within the calendar year 1924 is of the entire period. In that way he gets the two items that make his total tax for a fiscal year.

These two methods of computing taxes are different and would produce entirely different taxes on the same income. Those computed under Section 207 (b) would, in the present case, be more than two-thirds of the total tax figured at 1923 rates because of the higher brackets in which the portion of the income applicable to 1923 would be placed. Taxes computed under Section 207 (a) would be exactly two-thirds of such total tax.

The refund provided under Sections 1201 (a) and 1201 (b) is based upon a tax computed under Section 207 (a) because Sections 1201 (a) and 1201 (b) allow a refund on the "proportion" of the tax for the entire fiscal year which the portion of the fiscal year falling within 1923 bears to the entire period. Such a "proportion" of the tax is employed only in Section 207 (a). It has no relation to Section 207 (b) by which the "income", and not a "proportion" of the tax, is allocated between separate years. Therefore a refund of 25% of the amount which is placed in the higher brackets under Section 207 (b) finds no warrant in the statute.

If it be contended that the taxpayers, though not entitled to a refund based on the taxes computed for 1923 under Section 207 (b), are entitled to a refund of two-thirds of the tax for the partnership year calculated under Section 207 (a), the answer is that a refund based upon such a tax would bear no relation to the taxes which must be computed on partnership income under Section 207 (b). To maintain this last contention would be to allow the refund of a percentage of a tax that was not, under the statute, the tax to be computed against the partnership income.

The Board of Tax Appeals has uniformly adopted the construction of the statute which seems to us inevitable and indeed the only interpretation that will reconcile the various statutory provisions relating to the 25% credit or refund. The opinion of Mr. Sternhagen in Appeal of Charles Colip, 5 B. T. A. 123, appears to reach the correct result rather than in White vs. Maddison, supra, from which, with all deference, we feel compelled to differ.

The appellants argue that a refusal to allow a refund on partnership income accruing in 1923 because under the Revenue Act it has to be returned as part of the 1924 income of the partners is arbitrary and violates the Fifth Amendment of the Constitution. But all taxpayers similarly situated are treated alike. There may be individual hardships and a firm which did not exist in 1922 and began business in 1923 would be unable to obtain any refund under the remedial provisions of the Act of 1924. On the other hand, as we have pointed out, if the contention of the appellants were adopted a partnership having business beginning April 30, 1922, would secure a refund on taxes arising from the partnership business that was based not upon 1923 income, but upon eight months also of income accruing in 1922. The revenue law is full of such hardships. If a man happens to sell property in a year when the tax rates are high he will be obliged to pay a tax often attributable to the accumulation of years upon capital gain. Except for practical considerations it would be more consistent with an ideal system to tax accruals in value from year to year, and not to wait for realization of capital gain. But such a method would require the business world to spend most, instead of much, of its time in accounting. Taxation can rarely be scientifically uniform, and it does not have to be. It need only be based on a reasonable classification which we cannot say was absent here. Barclay vs. Edwards, 267 U. S. at p. 450; Evans vs. Gore, 253 U. S. at p. 256; Diamond Shoe Co. vs. Commissioner, 42 Fed. (2d) 148.

The order of the Board of Tax Appeals is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and thirty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

GEORGE L. SHEARER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. George L. Shearer v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1931. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 46, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of George L. Shearer, Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of September, in the year of our Lord one thousand nine hundred and thirty one, and of the Independence of the said United States the one hundred and fifty sixth.

William Parkin, Clerk. (Seal of United States Circuit Court of Appeals for the Second Circuit.)

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,283. U. S. Circuit Court of Appeals, Second Circuit. Term No. 469. George L. Shearer, petitioner, vs. David Burnet, Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 19, 1931. File No. 36,283.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 470

WILLIAM A. W. STEWART, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 19, 1931

CERTIORARI GRANTED NOVEMBER 30, 1931

(36,284)

(36,284)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 470

WILLIAM A. W. STEWART, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1931

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 29229

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:
For Taxpayer: John A. Kratz, Esq., C. H. Butler, Esq.
For Commissioner: L. A. Luce, Esq.

1927.

June 21. Petition received and filed. Taxpayer notified.
" 22. Copy of petition served on General Counsel.
Aug. 19. Answer filed by G. C.
" 22. Copy of answer served on taxpayer. General Calendar.

1929.

Jan. 31. Hearing set Feb. 26, 1929.
Feb. 21. Motion to consolidate for hearing with docket 29,228 and continue to Day Calendar of March 19, 1929, filed by taxpayer. See 29,228. Granted to 3-19-29.

[fol. 2]

Mar. 19. Hearing had before Mr. Green. Briefs due in 30 days. Reply briefs due in 10 days. Submitted to Mr. Green.
" 22. Transcript of hearing, March 19, 1929, filed.
Apr. 17. Brief filed by G. C. See 29,228.
Nov. 30. Decision entered. Wm. R. Green, Div. 13.
" 30. Findings of fact and opinion rendered. Wm. R. Green, Div. 13. Judgment will be entered for the respondent.

1930.

May 14. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error and proof of service filed by taxpayer.
" 14. Præcipe with proof of service filed.

Now, June 10, 1930, the foregoing Docket Entries, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed June 21, 1927.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated April 23, 1927, bearing symbol numbers IT:PA:3-60D-RMH, and as a basis for this proceeding alleges as follows:

1. The petitioner is an individual and resident of New York City with his offices located at No. 45 Wall Street, New York City, New York.

2. The notice of deficiency, a copy of which is hereto attached and marked Exhibit "A", was mailed to the petitioner on April 23, 1927.

3. The taxes in controversy are income taxes for the calendar year 1924. The amount of deficiency claimed by the Commissioner is $7,435.71. The amount of tax in dispute is $5,933.23.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

[fol. 4] (a) The Commissioner erred in his determination that the twenty-five per cent. reduction provided by title XII of the Revenue Act of 1924 does not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

(b) The Commissioner erred in his determination that the provisions of title XII of the Revenue Act of 1924 allowing a credit or refund of twenty-five per cent of the tax shown by 1923 returns did not reduce the rates for 1923 within the meaning of Section 207 (b) of the Revenue Act of 1924.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

The petitioner filed an income tax return for the calendar year 1924. The principal part of his income was his distributive share as a partner of the law firm of Stewart & Shearer. The partnership made a return upon the basis of a fiscal year ending on April 30, 1924. The petitioner included in his return for the calendar year 1924 his distributive share of the partnership profits for the fiscal year of the partnership ending on April 30, 1924. The net income of the petitioner for the calendar year 1924 has been determined to be $91,165.35, of which amount $71,462.39 represents that part of the partnership profits attributable to 1923. The tax on income attributable to 1924 has been determined to be $686.43. The tax on $71,462.39 attributable to 1923 and taxable at rates in effect for 1923 [fol. 5] has been determined to be $23,732.92. The petitioner contended before the Treasury Department that the provisions of title XII of the Revenue Act of 1924 allowing a credit of twenty-five per cent. of the tax shown by 1923 returns reduced the rates for 1923 and that the tax of $23,732.92 computed by the Commissioner on income attributable to 1923 should be reduced by twenty-five per cent. or an amount of $5,933.23.

Wherefore the petitioner prays that this Board may hear the proceeding and that the Board decree:

1. That the effect of title XII of the Revenue Act of 1924 allowing a credit or refund of twenty-five per cent. of the tax shown by 1923 returns was to reduce the rates for 1923 within the meaning of Section 207 (b) of the Revenue Act of 1924.

2. That the petitioner is entitled to have the proposed additional tax reduced by the amount of $5,933.23 representing twenty-five per cent. of the tax on income attributable to 1923.

Harry J. Campaign, Counsel for Petitioner, 45 Wall Street, New York City. John A. Kratz, Counsel — Petitioner, 1537 Eye Street N. W., Washington, D. C.

[fol. 6] *Duly sworn to by William A. W. Stewart. Jurat omitted in printing.*

[fol. 7] EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:PA:3-60D. RMH.

April 23, 1927.

Mr. William A. W. Stewart, 45 Wall Street, New York, New York.

SIR: The determination of your income tax liability for the years 1923 and 1924, as set forth in office letter dated April 11, 1927, disclosed a deficiency in tax of $7,435.71 for 1924 and an overassessment of $1,288.73 for 1923, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals [fol. 8] and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:3-60D-RMH. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by (Signed) C. R. Nash, Assistant to the Commissioner.

Inclosures: Statement, Form A, Form 882.

[fol. 9] Statement

IT:PA:3-60D. RMH.

April 23, 1927.

In re Mr. William A. W. Stewart, 45 Wall Street, New York, New York

Years	Deficiency in tax	Over-assessment
1923	.....	$1,288.73
1924	$7,435.71	.....
Total	$7,435.71	$1,288.73

The report of the Internal Revenue Agent in Charge at New York, New York, dated March 11, 1927, has been reviewed and approved by this office with the following exception:

1923

The examining officer failed to take into consideration adjustment by which an overassessment of $19.92 was previously allowed by this office.

The statements contained in your letter of protest dated February 25, 1927, have been given careful consideration by this office. However, on the basis of information on file in this office, the determination of your tax liability, as indicated above, appears to be correct.

[fol. 10] The overassessment shown herein will be made the subject of a Certificate of Overassessment, which will reach you in due course through the office of the Collector of Internal Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year, or years, and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded, since a portion may be an assessment which has been entered but not paid.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Now, June 10, 1930, the foregoing Petition, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 11] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed Aug. 19, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Respondent admits that the petitioner is an individual with a principal place of business at No. 45 Wall Street, New York City, New York.

2. Respondent admits that a notice of deficiency was mailed to the petitioner on April 23, 1927.

3. Respondent admits that the taxes in controversy are income taxes for the calendar year 1924 in an amount not less than $5,933.23.

[fol. 12] 4. Respondent denies that he erred in determining the tax set forth in said notice of deficiency and further denies that he erred as alleged in sub-paragraphs (a) and (b) of paragraph 4 of the petition.

5. Respondent denies that the petitioner is entitled to have the proposed additional tax for the year 1924 reduced by the sum of $5,933.23, as alleged in paragraph 5 of the petition.

6. Respondent denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's appeal be denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel, L. A. Luce, Special Attorney, Bureau of Internal Revenue.

Now, June 10, 1930, the foregoing Answer, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 13] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Titles omitted]

STIPULATION AS TO FACTS—Filed Mar. 19, 1929

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following is a statement of all the material facts involved in the above-entitled appeals:

I. That George L. Shearer is an individual and a resident of New York, with his offices located at 45 Wall Street, New York, New York.

[fol. 14] II. That William A. W. Stewart is an individual and a resident of New York, with his offices located at 45 Wall Street, New York, New York.

III. That the partnership of Stewart & Shearer made and filed a return on the basis of a fiscal year ended April 30, 1924, and that the partnership was composed of George L. Shearer and William A. W. Stewart.

IV. That George L. Shearer made and filed his return on the basis of a calendar year.

V. That William A. W. Stewart made and filed his return on the basis of a calendar year.

VI. That the tax as computed by the respondent on the income of George L. Shearer for the calendar year 1924 is as follows:

Total net income		$36,151.15
Income subject to surtax		36,151.15
Less: Exemption	$2,900.00	
Dividends	4,025.67	
		6,925.67
Income subject to normal tax		$29,225.48

[fol. 15] Tax at 2% on $4,000.00		80.00
Tax at 4% on 4,000.00		160.00
Tax at 6% on balance $21,225.48		1,273.53
Surtax		1,558.14
(a) Normal tax @ 8% on $67,175.05 1923 income		5,374.00
(b) Surtax on $67,462.38 1923 income		21,870.32
Total tax		30,315.99
Credits: 25% of normal tax on earned income	51.00	51.00
Total tax assessable		30,264.99
Tax previously assessed		21,776.81
Additional to be assessed		$8,488.18

NOTE.—Paragraphs (a) and (b) represent the tax computed on that portion of the partnership income allocated to the eight months falling within the year 1923.

VII. That the tax as computed by the respondent on the income of William A. W. Stewart for the calendar year 1924 is as follows:

Total net income		$19,702.96
Income subject to surtax		19,702.96
Less: Exemption	None	
Dividends	$7,697.77	
		7,697.77
Income subject to normal tax		$12,005.19
[fol. 16] Tax at 2% on $4,000.00		$80.00
Tax at 4% on 4,000.00		160.00
Tax at 6% on balance $4,005.19		240.31
Surtax		208.12
(a) Normal tax @ 8% on $71,175.06 1923 income		5,694.00
(b) Surtax on $71,462.39 1923 income		18,038.92
Total tax		$24,421.35

Credits: 25% of normal tax on earned income	90.00	90.00
Total tax assessable		$24.331.35
Tax previously assessed		16,895.64
Additional to be assessed		$7,435.71

NOTE.—Paragraphs (a) and (b) represent the tax computed on that portion of the partnership income allocated to the eight months falling within the year 1923.

VIII. The sole issue in these appeals is whether or not the petitioners are entitled to a reduction of 25% of the tax shown in (a) and (b) of Paragraphs numbered VI. and VII.

[fol. 17] IX. That the entire evidence is contained in the foregoing stipulation of fact.

Harry J. Campaign, Counsel for Petitioner. C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for Respondent.

vh-k 3-9-29.

Now, June 10, 1930, the foregoing Stipulation, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 18] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 29228

GEORGE L. SHEARER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 29229

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated November 30, 1929

The provisions of Title XII of the Revenue Act of 1924, do not authorize a 25 per cent reduction of tax on calendar

year 1924 income reported in 1925, but taxable in part at 1923 rates under Section 207(b) of the Revenue Act of 1924. Charles Colip, 5 B. T. A. 123 followed.

C. H. Butler, Esq., for the Petitioners.
L. A. Luce, Esq., for the Respondent.

FINDINGS OF FACT AND OPINION

[fol. 19] In these proceedings, which have been consolidated for hearing and decision, the petitioners seek a redetermination of their income tax liabilitities for the calendar year 1924, for which year the respondent has determined a deficiency as to George L. Shearer in the amount of $8,488.18, of which $6,811.08 is in controversy, and as to William A. W. Stewart in the amount of $7,435.71, of which $5,933.23 is in controversy.

The sole question involved in both proceedings is whether the 25 per cent reduction provided by Title XII of the Revenue Act of 1924, reduces the calendar year 1924 tax payable in 1925, of an individual partner whose taxable income for the calendar year 1924 is made up in part of a share of the income of a partnership whose fiscal year ended April 30, 1924.

The facts were stipulated.

Findings of Fact

The petitioners are individuals and residents of New York, with their offices located at 45 Wall Street, New York City. They made and filed their individual income tax returns on the basis of a calendar year.

The partnership of Stewart & Shearer, whose members are the petitioners herein, made and filed a partnership return of income on the basis of a fiscal year ended April 30, 1924.

The respondent determined the net income of petitioner Shearer for the calendar year 1924, to be $103,613.53 of which amount $67,462.38 represents that part of the net income of the partnership attributable to the year 1923. [fol. 20] He further determined that the tax on the income attributable to 1924 was $3,071.67, and that the tax on the income attributable to 1923 was $27,244.32.

The respondent determined the net income of petitioner Stewart for the calendar year 1924, to be $91,165.35, of

which amount $71,462.39 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924, was $688.43, and that the tax on the income attributable to 1923 was $23,732.92.

Opinion

GREEN: The petitioners contend that under Title XII of the Revenue Act of 1924, the respondent should have reduced the tax on the income attributable to 1923 by 25 per cent. As previously stated, the amounts of taxes here in controversy are $6,811.08 as to Shearer, and $5,933.23 as to Stewart, which represents 25 per cent of the amounts of $27,244.32 and $23,732.92, respectively, set out in our findings as representing the tax on each of the petitioner's share of partnership net income attributable to the year 1923.

We have held in a long list of decisions following Charles Colip, 5 B. T. A. 123, that the statute did not permit the 25 per cent reduction here contended, for where the facts are such as are present in the instant proceedings. The respondent's determination must, therefore, be approved. See also Anna M. Tighe, et al., 12 B. T. A. 670, which case is now pending before the Circuit Court of Ap-
[fol. 21] peals for the Seventh Circuit, October term 1929, as Docket No. 4188.

Judgment will be entered for the respondent.

Now, June 10, 1930, the foregoing Findings of Fact and Opinion, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 29229

WILLIAM A. W. STEWART, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated November 30, 1929, it is

[fol. 22] Ordered and Decided: That there is a deficiency of $7,435.71 for the year 1924.

Enter.

(Signed) William R. Green, Jr., Member United States Board of Tax Appeals.

Entered Nov. 30, 1929.

A True Copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

Now, June 11, 1930, the foregoing Decision, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 23] Before United States Board of Tax Appeals

[Title omitted]

Notice of Filing Petition for Review—Filed May 14, 1930

C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent.

Sir: Please take notice that on the 14th day of May, 1930, the undersigned will present to this Board and file with the Clerk thereof the petition of William A. W. Stewart, a copy of which is enclosed herewith, for the review by the United States Circuit Court of Appeals for the Second Circuit of the final order and decision of the Board in the above entitled proceeding entered on the records of the said Board on the 30th day of November, 1929.

Dated New York City, May 14th, 1930.

Henry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

[fol. 24] Copy of the within notice and copy of the petition for review is hereby accepted this 14th day of May, 1930.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM A. W. STEWART, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION FOR REVIEW—Filed May 14, 1930

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petitioner is aggrieved by the decision of the United States Board of Tax Appeals rendered against him on November 30, 1929 in the case of his appeal to the said Board [fol. 25] from a deficiency in income taxes for the year 1924 determined by the Commissioner of Internal Revenue, which appeal was numbered 29229 on the docket of the Board, and respectfully submits this petition for review thereof by the Circuit Court of Appeals for the Second Circuit.

I

Statement of Nature of the Controversy

The petitioner on June 21, 1927, duly filed with the United States Board of Tax Appeals in pursuance of the provisions of the Revenue Act of 1926, a petition requesting a redetermination of a deficiency in 1924 income taxes against him amounting to $7,435.71. Of this additional tax $1,502.48 results from adjustments in the return filed by the petitioner to which no objection was made. The balance of the proposed additional tax, amounting to $5,933.23, is the amount of tax in dispute. The principal part of petitioner's income as shown in his 1924 income tax return represented his distributive share as a partner of the law firm of Stewart & Shearer. The partnership made an income tax return on the basis of a fiscal year ending on April 30, 1924. The petitioner included in his individual return for the calendar year 1924 his distributive share of the partnership profits for the fiscal year ending on April 30, 1924. Under such conditions the rates of tax for the calendar year during which such fiscal year of the partnership began applied to that amount of the

[fol. 26] petitioner's share of partnership profits equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. The rates of tax for the calendar year during which such fiscal year ended applied to an amount of petitioner's share of such partnership net income equal to the portion which the part of such fiscal year ending within such calendar year bears to the full fiscal year. As a result of this two-thirds of the petitioner's share from the partnership profits derived for the fiscal year ending April 30, 1924, was taxable at rates in effect for the calendar year 1923 and one-third at rates in effect for the calender year 1924.

The net income of the petitioner for the calendar year 1924 has been determined to be $91,165.35, of which amount $71,462.39 represents that part of the partnership profits attributable to 1923. The tax on income attributable to 1924 has been determined by the Commissioner to be $688.43. Tax on $71,462.39, attributable to 1923 and taxable at rates in effect for 1923, has been determined by the Commissioner to be $23,732.92.

Section 1200 (a) (Title XII) of the Revenue Act of 1924 reduced the tax on 1923 incomes by providing that any person making a return for the calendar year 1923 was entitled to an allowance by credit or refund of twenty-five per cent of the amount shown as the tax upon his return. The petitioner contended before the Treasury Department and the Board of Tax Appeals that the provisions of Title XII of the Revenue Act of 1924 allowing [fol. 27] a credit or refund of twenty-five per cent of the tax shown on 1923 returns reduced the rates for 1923 and that the tax of $23,732.92 computed by the Commissioner on income attributable to 1923 should be reduced by twenty-five per cent, or an amount of $5,933.23.

On August 19, 1927, the respondent filed with the Board of Tax Appeals an answer to the petition, the cause thereby being at issue under the rules of practice of said Board. The case was submitted to the Board upon an agreed statement of facts. On November 30, 1929, the Board handed down an opinion adverse to the petitioner's contentions and held that the provisions of Title XII of the Revenue Act of 1924 allowing a credit of twenty-five per cent. of the tax shown on 1923 returns did not reduce the rates for 1923 and did not reduce the 1924 tax payable in 1925 of an indi-

vidual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

The petitioner paid the disputed tax under an agreement with the Commissioner of Internal Revenue that it would be refunded in the event of a successful prosecution of his appeal.

II

Designation of Court of Review

Your petitioner believes and avers that errors were committed by the Board to the damage and prejudice of the petitioner and desires a review thereof by the United States Circuit Court of Appeals for the Second Circuit [fol. 28] within which Circuit is located the office of the Collector of Internal Revenue with whom the petitioner filed his 1924 income tax return.

III

Assignment of Errors

The petitioner as a basis of review makes the following assignment of errors:

1. The Board erred in failing to hold that the effect of Title XII of the Revenue Act of 1924 allowing a credit or refund of twenty-five per cent. of the tax shown on 1923 returns was to reduce the rates for 1923 within the meaning of Section 207 (b) of the Revenue Act of 1924.

2. The Board erred in holding that the twenty-five per cent. reduction in tax provided by Title XII of the Revenue Act of 1924 does not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

3. The Board erred in failing to allow the petitioner a credit of twenty-five per cent. of the tax on that portion of the partnership income shown on his return for 1924 which was attributable to the year 1923.

4. The Board erred in rendering a decision for the respondent.

[fol. 29] Wherefore the petitioner prays that this Honorable Court may review said decision of said Board of Tax Appeals entered herein against him and reverse and set aside same and for such other and further relief as to the Court may seem just and proper.

William A. W. Stewart, Petitioner. Harry J. Compaign, Attorney for Petitioner, 45 Wall Street, New York City.

Duly sworn to by William A. W. Stewart. Jurat omitted in printing.

[fol. 30] Now, June 10, 1930, the foregoing Petition for Review with Proof of Service thereon, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PRÆCIPE—Filed May 14, 1930

To C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C., attorney for respondent.

SIR: Please take notice that on the 14th day of May, 1930, I filed with the Clerk of this Court a præcipe designating [fol. 31] the portions of the record to be transmitted to the Circuit Court of Appeals for the Second Circuit on the appeal taken in the above case, a copy of which præcipe is hereby annexed and herewith served on you.

Dated this 14th day of May, 1930, New York City, New York.

Harry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

Service of the within notice and copy of præcipe is hereby accepted on this 14th day of May, 1930.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[fol. 32] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE—Filed May 14, 1930

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within the sixty days of the filing of the petition for review in the above stated case, transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above entitled case.
2. Pleadings before the Board.
3. Stipulation setting forth agreed statement of facts.
[fol. 33] 4. Findings of fact, opinion and decision of the Board.
5. Final order of redetermination.
6. Petition for review.
7. Proof of service and notice of filing petition for review.
8. This designation of record.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Harry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

Now, June 10, 1930, the foregoing Præcipe, with Proof of Service thereon, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

B. T. A. No. 29229. C. C. A. No. —

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MOTION

Comes now David Burnet as Commissioner of Internal Revenue, by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows to the Court;

That since the filing of the petition for review in the above-entitled cause, Robert H. Lucas, who was at that time Commissioner of Internal Revenue, and who was the respondent at that time in the above-entitled cause, has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted;

That said Robert H. Lucas ceased to be Commissioner of Internal Revenue on August 15, 1930;

That David Burnet was duly ap-ointed as Commissioner of Internal Revenue to succeed the said Robert H. Lucas and has duly qualified as said Commissioner of Internal Revenue;

That on August 20, 1930, David Burnet became Commissioner of Internal Revenue, and ever since that time has been and now is Commissioner of Internal Revenue;

Wherefore, it is accordingly prayed that the above-entitled cause be revived so that this action will be pending against the said David Burnet, as Commissioner of Internal Revenue, and that the said David Burnet, as Commissioner of Internal Revenue, may be substituted as the respondent in this cause for the said Robert H. Lucas, formerly Commissioner of Internal Revenue.

It is further shown to the Court that there is substantial need for so continuing and maintaining this cause because if it is not so continued and maintained, the order of the

United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality, or obtain a refund thereof.

It is also shown to this Court that the said David Burnet, as Commissioner of Internal Revenue, by and through his attorney, has caused to be mailed to the attorney of record for the petitioner in the above-entitled cause a copy of this motion to revive this action in the name of David Burnet, as Commissioner of Internal Revenue, and to have his name substituted as the respondent in this cause.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for David Burnet, as Commissioner of Internal Revenue.

DISTRICT OF COLUMBIA, ss:

C. M. Charest, General Counsel, Bureau of Internal Revenue, being duly sworn, says that he is the attorney for David Burnet, as Commissioner of Internal Revenue, and as such is duly authorized to verify this motion; that he has read the foregoing motion and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as may be stated upon information and belief, and those facts he believes to be true.

C. M. Charest.

Sworn and subscribed to before me this 7 day of Nov., 1930. Marcellette M. Taylor, Notary Public, District of Columbia. My Commission expires March 31, 1935. (Seal of Marcellette M. Taylor, Notary Public, District of Columbia.)

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York,

on the 20th day of November, one thousand nine hundred and thirty—.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

A motion having been made herein by counsel for the Respondent to substitute David Burnet, Commissioner of Internal Revenue, in the place and stead of Robert H. *Ucas*, Commissioner of Internal Revenue, to respondent,

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Willia, A. W. Stewart v. Commissioner of Internal Revenue. Order. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 20, 1930. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM A. W. STEWART, Appellant,

against

COMMISSIONER OF INTERNAL REVENUE, Appellee

GEORGE L. SHEARER, Appellant,

against

COMMISSIONER OF INTERNAL REVENUE, Appellee

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeals from the United States Board of Tax Appeals

Petitions by William A. W. Stewart and George L. Shearer, taxpayers, to review orders of the United States

Board of Tax Appeals, sustaining the action of the Commissioner of Internal Revenue in determining a deficiency in the income taxes of each taxpayer for the year 1924. Affirmed.

Harry J. Campaign, Attorney for Appellants; William A. W. Stewart, George L. Shearer, and Harry J. Campaign, Counsel.

G. A. Youngquist, Assistant Attorney General; Sewall Key and Norman D. Keller, Special Assistants to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue, and J. K. Polk, Special Attorney, Bureeau of Internal Revenue, of counsel, for Appellee.

Raymond M. White, Amicus Curiæ.

AUGUSTUS N. HAND, Circuit Judge:

The above appeals were argued together and relate to the income taxes of the appellants who are law partners doing business under the name of Stewart & Shearer. They made and filed their individual returns on the basis of a calendar year, and the additional taxes found against them are for the calendar year 1924. The partnership filed a partnership return on the basis of a fiscal year ending April 30, 1924. The appellants included in their individual returns for the calendar year 1924, their distributive shares of the partnership profits for its fiscal year, thus including eight months of firm profits earned in 1923. The Commissioner correctly found the taxes on income attributable to 1923 at the rates prevailing for that year, but refused to allow the appellants a reduction of 25% of such taxes under Sections 1200 and 1201 (b) of the Revenue Act of 1924. As a result, the appellants say that they have been improperly held for a deficiency in their income taxes to the amount of $6,811.08 in the case of Shearer and $5,933.23 in the case of Stewart. The Board of Tax Appeals affirmed the action of the Commissioner.

The question before us is whether the appellants are entitled to receive a 25% reduction of their income taxes on that portion of the partnership income which was, by Section 207 (b) of the Revenue Act of 1924, taxable at 1923 rates.

Sections 218 (a) of the Act of 1924 provided that persons carrying on business in partnership should be liable for income taxes only in their individual capacity. It re-

quired that, if the income of a partner was computed for a period different from that of the partnership, there should be included in his individual return his distributive share of the net income of the partnership for any accounting period ending within the taxable year upon the basis of which his own income was computed.

In other words, Section 218 (a) required each appellant when he filed his return on March 15, 1925, for the calendar year 1924, to bring in his distributive share of the partnership income for the entire fiscal year that ending April 30, 1924. Thus each return, though for the year 1924, necessarily included income of the partnership for eight months' of 1923.

By the Revenue Act of 1924, rates for income taxes were greatly reduced. Section 207 (a) dealt with cases where taxpayers make returns for a year, different from the calendar year, and the rates are changed during the period. It provided that in such cases the tax on the entire income for the fiscal year should be computed at the rate prevailing during the first calendar year and the proportion of the tax which the period in which these rates were in effect bore to the entire fiscal year should be ascertained. To this sum should be added the proper proportion of the tax computed at the rates prevailing during the second calendar year in order to get the total. This section covered individual taxes only, for, by reason of Section 218 (a), supra, individuals, and not partnerships, are liable for income taxes and the return of a partnership is essentially no more than an information return.

The method of calculating the tax upon partnership income to be included in individual returns, in cases where rates have changed and the income has accrued in calendar years having different tax rates, was prescribed by Section 207 (b) of the same Revenue Act. Section 207 (b) applies the 1923 rates to the proportion of the fiscal year of the partnership falling within the calendar year 1923 and applied the 1924 rates to the proportion of the fiscal year falling within the calendar year 1924. For purposes of surtax it places the partnership income subject to the 1924 rates in the lower brackets, and the income subject to the 1923 rates in the higher brackets. In doing this, Congress, so far as possible, effectuated the high sur-taxes of 1923 by

applying them to the proportion of the income allocated to 1923 at the top.

Owing to the surplus in the Treasury in 1923, it was decided to low income tax rates and it was at first proposed to make the new Revenue Act applicable to 1923 income. But as the bill was not ready for passage until after the returns for 1923 income had been filed, it was thought best to limit the relief to 1923 income to a credit or refund of 25%. Accordingly the following provisions were inserted in the Act of 1924:

"Sec. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return. * * *

"Sec. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period. * * *"

We think it clear that none of the statutory provisions just quoted afford appellants the relief which they ask. Section 1200 (a) does not, for it only relates to a taxpayer making a return for the calendar year 1923 and Stewart and Shearer each made a return for the calendar year 1924. It allows a 25% credit or refund upon the whole amount properly shown as the tax upon a return for that calendar year, whenever the income may have accrued. Under Sec-

tion 218 (a) taxpayers had to bring in the distributive share of any partnership income for an accounting period of the partnership ending within the taxable year, upon the basis of which the partners' net income was computed. Owing to this latter section, as construed by the Department, Stewart and Shearer would have been entitled to a 25% deduction upon income of their partnership accruing during the entire fiscal year from April 30, 1922 to April 30, 1923.

Section 1201 (a) applies only to a taxpayer making a return for a period beginning in 1922 and ending in 1923. If the appellants had been making their individual returns for a period beginning April 30, 1922, and ending April 30, 1923, this section would have applied, but they were making them for the calendar year 1924, and not for a fiscal year.

Section 1201 (b) applies to a taxpayer making a return for a period beginning in 1923 and ending in 1924. The appellants were not making a return for such a period, but for the calendar year 1924. By its terms, Section 1201 (b), as Section 1201 (a), relates only to taxpayers reporting income for a fiscal year different from a calendar year—a situation not involved here. Section 1201 (a) covers only cases where a taxpayer, not a partner, is reporting income under § 207 (a) for a split fiscal year. Under § 207 (a) Section 1201 (b) deducts 25% from the proportion of the tax alloted under § 207 (a) to 1923. Section 1201 (b) is not applicable to a case where partnership income, and not the tax, is allocated between separate years as provided in the case of partnerships by § 207 (b).

The strongest argument for the taxpayers is that Congress intended to allow a general reduction of taxes paid for all income accruing in the year 1923. This prevailed with the Court of Appeals of the First Circuit in White vs. Maddison, 45 Fed. (2d) 335. Congress allowed reductions under § 1200 (a) to those who filed returns for 1923 on a calendar year basis, and under § 1201 (a) and § 1201 (b) to those who filed for 1923 or 1924 on a fiscal year basis. Must we not suppose that it intended to allow a reduction of the tax on an individual who reported for his 1924 return his distributive share of the net income earned partly in 1923?

An affirmative answer to this query seems impossible. In the first place Congress might well have thought that

most partnerships were continuous during the periods covered by the remedial legislation relating to 1923 income and that when a partner whose year for accounting ended in 1923, got a 25% deduction on earnings embracing firm income accruing in 1922, as well as down to the termination of the partnership fiscal year, in 1923, this was sufficient relief from the high tax rates prevailing in 1923. If, however, the contention of the appellants were adopted, such a partner would get not only a deduction on partnership income for a split year beginning in 1922 and ending in 1923, he would also obtain a deduction on partnership income during the remainder of 1923. In other words, in a case like the present, he would get a deduction on twenty months of partnership income.

Another argument even more fatal to appellants' position is that Section 1201 (b), if applicable, would allow a credit or refund of 25% on the proportion of the total tax paid by the reporting taxpayer at 1923 rates which the portion of the period falling within the calendar year bore to the fiscal year of the partnership.

An allowance of 25% of the portion of the tax upon firm income, required by Section 207 (b) to be placed in the higher brackets, and thus to be calculated at the highest rates, would be for a different sum than that allowed by Sec. 1201 (b). In other words, it would not be on two-thirds of the whole tax for the fiscal year as required by Section 1201 (b), but on a tax which two-thirds of the net firm income would yield when placed in the higher brackets.

The difficulties which the position of appellants involves may be further amplified. If the tax is computed under Section 207 (b) the method is for the taxpayer to divide his income into two parts according to the year in which it was earned; the income attributable to 1924 is then put in the lower brackets, and the income attributable to 1923 is put in the next higher brackets.

If the tax is computed under Section 207 (a) the method is for the taxpayer first to consider all his income as earned in 1923, to compute his tax on that basis, and then to take such proportion of the tax as the portion of the fiscal year falling within the calendar year 1923 is of the entire period. Then the taxpayer considers all his income as earned in 1924, computes his tax on that basis, and takes such proportion of the tax as the portion of the fiscal

year falling within the calendar year 1924 is of the entire period. In that way he gets the two items that make his total tax for a fiscal year.

These two methods of computing taxes are different and would produce entirely different taxes on the same income. Those computed under Section 207 (b) would, in the present case, be more than two-thirds of the total tax figured at 1923 rates because of the higher brackets in which the portion of the income applicable to 1923 would be placed. Taxes computed under Section 207 (a) would be exactly two-thirds of such total tax.

The refund provided under Sections 1201 (a) and 1201 (b) is based upon a tax computed under Section 207 (a) because Sections 1201 (a) and 1201 (b) allow a refund on the "proportion" of the tax for the entire fiscal year which the portion of the fiscal year falling within 1923 bears to the entire period. Such a "proportion" of the tax is employed only in Section 207 (a). It has no relation to Section 207 (b) by which the "income", and not a "proportion" of the tax, is allocated between separate years. Therefore a refund of 25% of the amount which is placed in the higher brackets under Section 207 (b) finds no warrant in the statute.

If it be contended that the taxpayers, though not entitled to a refund based on the taxes computed for 1923 under Section 207 (b), are entitled to a refund of two-thirds of the tax for the partnership year calculated under Section 207 (a), the answer is that a refund based upon such a tax would bear no relation to the taxes which must be computed on partnership income under Section 207 (b). To maintain this last contention would be to allow the refund of a percentage of a tax that was not, under the statute, the tax to be computed against the partnership income.

The Board of Tax Appeals has uniformly adopted the construction of the statute which seems to us inevitable and indeed the only interpretation that will reconcile the various statutory provisions relating to the 25% credit or refund. The opinion of Mr. Sternhagen in Appeal of Charles Colip, 5 B. T. A. 123, appears to reach the correct result rather than in White vs. Maddison, supra, from which, with all deference, we feel compelled to differ.

The appellants argue that a refusal to allow a refund on partnership income accruing in 1923 because under the Revenue Act it has to be returned as part of the 1924 income of the partners is arbitrary and violates the Fifth Amendment of the Constitution. But all taxpayers similarly situated are treated alike. There may be individual hardships and a firm which did not exist in 1922 and began business in 1923 would be unable to obtain any refund under the remedial provisions of the Act of 1924. On the other hand, as we have pointed out, if the contention of the appellants were adopted a partnership having business beginning April 30, 1922, would secure a refund on taxes arising from the partnership business that was based not upon 1923 income, but upon eight months also of income accruing in 1922. The revenue law is full of such hardships. If a man happens to sell property in a year when the tax rates are high he will be obliged to pay a tax often attributable to the accumulation of years upon capital gain. Except for practical considerations it would be more consistent with an ideal system to tax accruals in value from year to year, and not to wait for realization of capital gain. But such a method would require the business world to spend most, instead of much, of its time in accounting. Taxation can rarely be scientifically uniform, and it does not have to be. It need only be based on a reasonable classification which we cannot say was absent here. Barelay vs. Edwards, 267 U. S. at p. 450; Evans vs. Gore, 253 U. S. at p. 256; Diamond Shoe Co. vs. Commissioner, 42 Fed. (2d) 148.

The order of the Board of Tax Appeals is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and thirty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. William A. W. Stewart v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1931. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, number from 1 to 48, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of William A. W. Stewart, Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of September, in the year of our Lord one thousand nine hundred and thirty one, and of the Independence of the said United States the one hundred and fifty sixth.

William Parkin, Clerk. (Seal of United States Circuit Court of Appeals for the Second Circuit.)

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,284. U. S. Circuit Court of Appeals, Second Circuit. Term No. 470. William A. W. Stewart, petitioner, vs. David Burnet, Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 19, 1931. File No. 36,284.

FILE COPY

FILE
OCT 19
CHARLES ELMORE

Supreme Court of the United States

October Term, 1931.

No. 469

GEORGE L. SHEARER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI AND PETITIONER'S BRIEF ON APPLICATION.

CHARLES HENRY BUTLER,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1931

No.

GEORGE L. SHEARER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of GEORGE L. SHEARER respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The Circuit Court of Appeals for the Second Circuit, by its decree entered July 24, 1931, has affirmed an order of the United States Board of Tax Appeals sustaining the

action of the Commissioner of Internal Revenue in determining a deficiency in the income tax of the petitioner for the year 1924. The precise question involved has also arisen in the First Circuit, where the Circuit Court of Appeals has decided adversely to the contention of the government. The decisions in the two circuits are in flat contradiction to each other.

There is no dispute as to the facts. The appellant made and filed his individual return of income of 1924, making his return for the calendar year. A substantial part of the appellant's income consisted of his distributive share, as a partner, of the partnership income of the law firm of Stewart & Shearer. The firm filed a partnership return on the basis of the fiscal year ending April 30, 1924. The appellant included in his individual return for the calendar year 1924 his distributive share of the partnership income for its fiscal year, thus including eight months income earned in 1923.

Former revenue acts had provided specifically for the case of a partnership return for a fiscal year made up of portions of two calendar years to which different rates were applicable. With slight modification of phraseology this provision was continued in the Revenue Act of 1924. By the provisions of Section 207(b) the tax imposed on an individual whose return included a distributive share of the income of a partnership reporting for a fiscal year of this kind conformed, as to the tax on such distributive share, to the rates applicable to the two portions of his partnership's fiscal year.

The rates applicable to income of 1923 were fixed by Section 1200, subd. (a), of the Revenue Act of 1924,

which, in the case of a taxpayer making a return for that calendar year, gave him a refund or credit, as the case might require (depending on whether or not he had paid the tax), of 25 per cent of the amount of the tax under the Revenue Act of 1921. The reduced rates thus made applicable to incomes of 1923 were not identical with those for 1924 imposed by the same act of 1924, so that a fiscal year expiring April 30, 1924, was made up of portions of two calendar years to which different rates were applicable.

Further provisions for insuring to the person paying a tax in respect to income earned or accruing in 1923 but returned in a return for a fiscal year different from the calendar year 1923 were made by Sections 1201(a) and 1201(b) of the act of 1924. Section 1201(a) provided for the case of a taxpayer making a return for a fiscal year beginning in 1922 and ending in 1923, and Section 1201(b) for that of a taxpayer making a return for a fiscal year beginning in 1923 and ending in 1924. In each case a credit of 25 per cent was allowed for that part of the tax corresponding to the portion of the fiscal year falling within 1923.

The government has contended that none of these sections gave relief to a taxpayer in the situation of the appellant, that is, of one who made a return for the calendar year 1924 of income which included his distributive share of partnership earnings for a fiscal year falling partly within 1923 and partly within 1924, and has refused to allow claims for refund or claims in abatement based thereon. The question was squarely presented in *Maddison* v. *White* (40 Fed. (2d) 564), where the District Court for

the District of Massachusetts overruled the government's contention and held that a taxpayer whose 1924 income included a partnership distributive share of the kind above stated was entitled to the 25 per cent reduction. This decision was unanimously affirmed by the Circuit Court of Appeals for the First Circuit, *White* v. *Maddison,* (45 Fed. (2d) 335).

The present proceeding was initiated and brought before the Board of Tax Appeals prior to the decision of the *Maddison* case. The Board upheld the government's contention and refused to allow the taxpayer the 25 per cent reduction. Thereafter by petition for review the case was duly brought before the Circuit Court of Appeals for the Second Circuit. Meanwhile the decision had been rendered in the *Maddison* case, but in the present case the Circuit Court of Appeals for the Second Circuit declined to follow the decision of the Circuit Court of Appeals for the First Circuit in the *Maddison* case, and affirmed the action of the Board. It is to review this decision that the present application for certiorari is made.

B

Reasons Relied on for the Allowance of the Writ

1. The sole question is whether the 25 per cent reduction in the tax on 1923 income granted by the Revenue Act of 1924 should be taken into consideration in computing the tax income reported by an individual for the calendar year 1924, as a share of profits or income attrib-

utable to 1923 from a partnership whose fiscal year ended April 30, 1924. The text of the several sections of the act above referred to, under which the reduction is claimed, is set forth in the petitioner's brief on this application presented herewith.

2. The decision of the court below is as above stated in irreconcilable conflict with that made by the Circuit Court of Appeals for the First Circuit on a state of facts practically identical with that in the case at bar. Under circumstances precisely similar to those here presented, the Circuit Court of Appeals in the First Circuit holds that the taxpayer is entitled to the benefit of the 25 per cent reduction. No certiorari to review that decision was applied for, and the time for such application has long since expired. Until the conflicting decision in the case at bar, the ruling in *White* v. *Maddison* stood as the controlling judicial interpretation of the law on this subject.

3. These conflicting decisions make the present state of the law one of hopeless confusion. Of two taxpayers having incomes identical in kind and received from precisely similar sources, the taxpayer in one part of the country finds his income tax burden substantially different in rate from that of the other taxpayer, residing in another part of the country. One receives a 25 per cent credit on the tax on income accrued in 1923 and the other does not. This conflict of law is bad enough for those in the First and Second Circuits, but at least each knows for what tax he will be held liable, although there is one law for the First Circuit and another for the Second, but in the re-

maining seven circuits it is impossible for taxpayers similarly situated to know the amount of their tax, for they are confronted by judicial precedents diametrically opposed yet of equal authority. Until this conflict of authority be resolved, taxes, so far as this particular kind of tax is concerned, have ceased to be "uniform within the United States." The conflict is not only irreconcilable but of general interest and substantial in scope, for there are throughout the country many thousands of partnerships that keep their books on a fiscal year not identical with the calendar year, and many cases as yet undetermined involving the application of the 25 per cent credit granted on the lowering of the rates in 1924.

4. The decision below is thus flat in the face of what has hitherto been the controlling authority, "from which," says the court below, "with all deference, we feel compelled to differ" (Rec. p. 40).

5. Whether the court below was warranted in refusing to taxpayers in the Second Circuit the relief which the courts award them in the First is considered in our brief submitted with this petition. But whatever may be said in favor of the decision in the Second Circuit, the question should not be left in this state of hopeless confusion. Only by granting a writ of certiorari can this conflict of authority be remedied.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 29,228, George L. Shearer, *v.* Commissioner of Internal Revenue, and that the said decree of the said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

October, 1931.

GEORGE L. SHEARER,

By CHARLES HENRY BUTLER,

Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1931

WILLIAM A. W. STEWART

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

GEORGE L. SHEARER

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

BRIEF FOR PETITIONERS ON APPLICATIONS FOR WRITS OF CERTIORARI

These are applications for certiorari to review two decrees of the Circuit Court of Appeals for the Second Circuit entered July 24, 1931, one affirming a determination of the

Board of Tax Appeals adjudging a deficiency of $7,435.71 on the income tax of the petitioner William A. W. Stewart for 1924, and the other affirming a like determination in the case of the petitioner George L. Shearer in the sum of $8,488.18 for the same year. The sole question in each case relates to the applicability to the petitioner of the 25 per cent. reduction in rates of income tax made by the Revenue Act of 1924.

The two cases were heard together in the court below and a single opinion written covering both cases. A separate application for certiorari is made and a separate record presented in each case, but as the question presented is identical in both cases, the brief is identical and is therefore entitled in both cases.

The opinion below has not yet been reported in the official reports or elsewhere.

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Jurisdiction

Jurisdiction to review is conferred by Section 347 of the Judicial Code, providing that in any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court, upon the petition of any party thereto, to require by certiorari that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the case had been brought there by unrestricted writ of error or appeal. The decrees below were entered July 24, 1931, and these applications are made within the three months prescribed by Section 350 of the Judicial Code.

Each of the present cases is one of those specified in Rule 38 par. 5, subd. (b), "where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter." It is further submitted by the petitioner in each case that apart from this fact the case is one of those mentioned in such subdivision as one wherein the court below has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and has decided an important question of federal law which has not been, but should be, settled by this court.

Statement of Case

The petitioners are members of the partnership of Stewart & Shearer, with offices at No. 45 Wall Street, New York City. In 1925 they made and filed their individual income tax returns for 1924 on a basis of a fiscal year as to

their partnership income and of a calendar year as to their other income. In each case the return was made on the "Fiscal Year" blank form. The additional taxes imposed are assessed for the calendar year 1924. The partnership of Stewart & Shearer made and filed a partnership return of income on the basis of a fiscal year ending April 30, 1924. The petitioners included in their individual returns for the year 1924 their distributive shares of the partnership profits for its fiscal year ending April 30, 1924, thus including eight months of such profits earned in 1923.

The Commissioner correctly found the tax on income attributable to 1923, at the old 1923 rates before the reduction thereof effected by Section 1200 (a) of the Revenue Act of 1924, to be $23,732.92 in the case of petitioner William A. W. Stewart (Rec., fol. 59), and $27,244.32 in the case of petitioner George L. Shearer (Rec., fol. 56). In computing the tax on that portion of the income to which the rates for the calendar year 1923 applied he did not allow either of the petitioners the benefit of the reduction of 25 per cent. provided for by Sections 1200 (a) and 1201 (b) of the Revenue Act of 1924. The allowance of such 25 per cent. would result in a reduction of the tax claimed on income attributable to 1923 by $5,933.23 in the case of petitioner William A. W. Stewart and by $6,811.08 in the case of petitioner George L. Shearer.

The Commissioner's determination was in each case approved by the Board of Tax Appeals (Rec., Stewart, fols. 60, 62-66; Shearer, fols. 57, 61-63), and on review by the Circuit Court of Appeals for the Second Circuit the Board's determination was affirmed (Stewart, p. 44; Shearer, p. 42).

Statutes Involved

The pertinent provisions of the Revenue Act of 1924 are as follows:

Sec. 207 (b):

> "If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then
>
> "(1) The rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and
>
> "(2) The rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.
>
> "In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year."

Sec. 218 (a):

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

"There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed."

Sec. 1200:

"(a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return."

Sec. 1201:

"(a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923, is of the entire period."

Conflict of Decisions in the Circuit Courts of Appeals

In *White* v. *Maddison* (45 Fed. (2d) 335, affirming *Maddison* v. *White,* 40 Fed. (2d) 564), arising on a state of facts practically identical with that in the cases at bar, it was held by the Circuit Court of Appeals for the First Circuit that an individual making a return for the calendar year 1924 whose income as returned included his distributive share of a partnership making a return for a fiscal year beginning in 1923 and ending in 1924, was entitled to the 25 per cent. reduction of the tax on that part of the income attributable to 1923. The decisions of the Circuit Courts of Appeal in the First and Second Circuits are thus in irreconcilable conflict. In its opinion below the court refers to the decision in the *Maddison* case as one "from which with all deference, we feel compelled to differ" (Stewart p. 42; Shearer, p. 40).

On these applications we respectfully submit that the question being one on which there is admittedly hopeless conflict of authority in the two circuits, and one of general interest and substantial in scope, partnership returns for fiscal years being of wide use throughout the country and the determination of the proper tax being one demanded in

a vast number of such cases, the law should be settled by this court.

It is unnecessary to present any argument on the ground of conflict of authority. The conflict is patent and not disputed. Its general interest and wide scope are apparent on a mere statement of the issue. It may be proper to summarize briefly the considerations on which we urge that the decision in the present cases is erroneous in law and should be reversed and the rule as laid down and applied in the First Circuit approved.

Specification of Errors

I. The Circuit Court of Appeals erred in holding that the rates of tax on income of 1923 as used in Section 207 (b) of the Revenue Act of 1924 were the rates imposed by the Revenue Act of 1921 irrespective of the reduction in those rates effected by the Revenue Act of 1924.

II. The Circuit Court of Appeals erred in holding that the 25 per cent. reduction in tax provided by Title XII of the Revenue Act of 1924 does not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

III. The Circuit Court of Appeals erred in failing to allow the petitioners a credit of 25 per cent. of the tax on that portion of the partnership income shown on their returns for 1924 which was attributable to the year 1923.

IV. The Circuit Court of Appeals erred in holding that the returns for the calendar year 1924 wherein the petitioners included their distributive shares of the profits or income of a partnership having a fiscal year beginning in 1923 and ending in 1924 were not within the purview of Section 1201 (b) of the Revenue Act of 1924.

V. The Circuit Court of Appeals erred in each case in affirming the determination of the Board of Tax Appeals.

Summary of Argument

The 25 per cent. reduction in rates made by Congress by the Revenue Act of 1924 was operative in respect to the tax on all income earned in 1923 and attributable to that year.

The unbroken policy of the successive revenue acts has been to preserve the identity of the year to which income is attributable and to tax it at the rates applicable to such year.

The rates applicable by law to 1923 were 75 per cent. of the 1921 rates.

The act of 1924, like the previous acts, contained minute and careful provisions assuring to the fiscal year taxpayer and the partner the same reduction granted to other taxpayers.

The decision below is in flat contradiction to the correct rule as declared and applied in the First Circuit.

Argument

When a reduction of taxes was determined upon in the early months of 1924 it was the intention to grant a deduction in the taxes on 1923 income whenever paid,—the taxes, that is, imposed in respect to income earned, received or accrued during any and every part of the calendar year 1923. In other words, the tax charge on income of 1923 was to be reduced. "But," as the court below points out in its opinion (Rec., Stewart, p. 39; Shearer, p. 37), "as the bill was not ready for passage until after the returns for 1923 income had been filed, it was thought best to limit the relief to 1923 income to a credit or refund of 25 per cent." This 25 per cent. credit on a tax already reported was the only practicable way, in respect to 1923 income returned in 1924, of giving a benefit approximately equal to the reduction in rates applicable to the tax on income of subsequent years. To attempt to undo all the returns that had been filed and on which taxes had already been wholly or partially paid in March 1924 and recompute the tax would have resulted in utter chaos.

In the administration of the successive revenue acts it had long been a familiar occurrence that the fiscal year of a taxpayer, or the fiscal year of his partnership, frequently differed from the calendar year, so that the income actually received by a taxpayer in any particular calendar was made up in part of income attributable to that year and in part of income attributable to the preceding year. In such cases, not only the revenue act in force when the amendment of 1924 was undertaken, but the older acts as well, had, in pur-

suance of an unbroken policy, provided that in cases where the taxpayer's fiscal year, or his partnership's fiscal year, differed from the calendar year, the incidence of taxation should be in accord with the time the income was actually earned rather than with the time it happened to be received by the taxpayer. This principle had long been an integral part of the structure of the income tax laws. When rates of tax had been changed the change had always taken effect at the beginning of a calendar year, and when the taxpayer's fiscal year was identical with the calendar year the change was operative automatically. But when the taxpayer's fiscal year, or his partnership's fiscal year, differed from the calendar year, in such cases the law had carefully preserved the identity of the income in accordance with the year to which it had been attributable, and the applicable rates of tax had been the rates applicable to such year and not to the year in which it had happened to be received. Thus if a taxpayer had had a fiscal year ending June 30, 1922, in making his return in 1923 of income of 1922 he would show the receipt of his income for the fiscal year ending June 30, 1922, but the law separated this into its components, attributing half of it to the six months which fell within the calendar year 1921 and half to the six months ending June 30, 1922, and the tax on the 1921 half was at the 1921 rates and that on the 1922 half at the 1922 rates.

Thus in the Revenue Act of 1918 it was provided by Section 205 (a),

> "That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue

> Act of 1916 * * * which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period."

Section 205 (b) of the same act of 1918 made similar provision in the case of a taxpayer making a return for a fiscal year beginning in 1918 and ending in 1919.

Both these provisions were carried with practically no change, other than the necessary new specification of years, into the Revenue Act of 1921, preserving the same section and subdivision numbers. In the act of 1924 the same provisions were continued, except that instead of being confined to the single change in rates effected by a specified statute they were made applicable in general terms to any statutory change in rates. The two paragraphs were thus merged in one, which takes the Section number 207 (a). It may be noted that this provision has continued practically unchanged in the subsequent revenue acts, as Section 207 (a) in the act of 1926 and Section 105 in that of 1928.

The unbroken policy of our revenue legislation thus carefully required and preserved the identification, for tax purposes, of income according to the year to which it was attributable and imposed the rates of tax applicable to such year. Probably these provisions might of themselves have been sufficient to provide for the segregation, for tax purposes, of a taxpayer's income that came in the form of his distributive share of earnings of a partnership having a fiscal year different from the calendar year. The succes-

sive acts, however, specifically provided for that particular kind of fiscal year income. In the act of 1918, Section 205 (c) provided that if a partnership fiscal year began in 1917 and ended in 1919, then the rates for the calendar year in which the fiscal year began should apply to that part of the income for the fiscal year which bore, to the whole of such income, the same proportion which the portion of the fiscal year falling in the first calendar year bore to the whole fiscal year; and that the rates for the calendar year in which the fiscal year ended should apply to the remainder of the income. The amount of the tax thus computed would differ slightly from the tax if computed under the general fiscal year provisions of Section 205 (a) above quoted.

This provision of the act of 1918 for the case of a partnership fiscal year was carried practically unchanged, except for the necessary change in designation of years, into the Revenue Act of 1921, retaining the same section number, and thence into the act of 1924, (the statute applicable to the cases at bar) as Section 207 (b), except that the provision was now expressed in general terms applicable to any change in rates instead of being confined to one specified statutory change, and a provision was added showing how, in such a return, the taxpayer's income other than his partnership distributive share was to be treated. As thus generalized and amplified the provision has been preserved in the subsequent act of 1926 as Section 207 (b) and in that of 1928 as Section 182 (b).

It was thus the uniform policy of the successive revenue acts, in cases where by reason of the taxpayer, or his partnership, keeping a fiscal year different from the calendar year, the income was attributable to parts of differ-

ent calendar years, to preserve the identity of the income attributable to the two calendar years portions of which made up the whole and to charge each portion with the rates for the year to which it was attributable.

Had the revenue act of 1924 been completed and become a law substantially in advance of the compilation by the taxpayers of their returns to be made by March 15 of that year, Congress would have had to do no more than reenact the provisions above quoted. But as above noted the bill was not ready for passage until the returns had been filed, the taxes computed and at least 25 per cent. thereof paid. So in respect to taxes on 1923 income included in those returns tax relief was given by a lump sum credit or refund of 25 per cent., an amount approximately, but not precisely, equivalent to the reduction in rates made effective for subsequent years. In order to harmonize the machinery of the new statute with the practice under the old in cases where the taxpayer or his partnership kept a fiscal year different from the calendar year, the 25 per cent. credit or refund was made to apply to that part of the income, whenever received or returned, which was attributable to 1923.

Manifestly his return for 1924, filed in 1925, would be the only place or occasion in respect to which a taxpayer would get his reduction in the tax on the 1923 part of any income accruing partly in 1923 and partly in 1924. It would of necessity be in the return filed in 1925 that the return of such income would appear.

As it was impracticable to require a new return and a recomputation of the tax, Congress fixed and determined the rates applicable to 1923 by a simple provision as follows:

"Sec. 1200 (a) Any taxpayer making return,

for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return. * * *"

The rates applicable to 1923 were thus fixed and determined as the rates of 1921 less 25 per cent.

This was of itself sufficient to provide for the case of a taxpayer whose income included the distributive share of the earnings of a fiscal year partnership. Section 207 (b) of the same act of 1924, which as we have seen merely reenacted in general terms a long familiar statutory provision theretofore expressed in terms of specific years, provided as follows:

"If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then

"(1) The rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and

"(2) The rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

"In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year."

In the return of each of the petitioners for 1924 (made in 1925) receipt was shown of the distributive share of the earnings of a partnership having a fiscal year ending April 30, 1924. Such fiscal year began in 1923, and in the language of the act the rates for the calendar year during which such fiscal year began were declared to apply to the portion of such income attributable to 1923 "determined under the law applicable to such calendar year," *i. e.*, to 1923. The "law applicable" to 1923 was the law which in Section 1200 (a) above quoted made the 1923 rates 25 per cent. less than those under the act of 1921. What other law was applicable to 1923? Every section in the act of 1924 that provided for a computation of the tax on income of 1923 (whether Section 1200 (a) referring to the ordinary return, Section 1201 (a) referring to a return of income attributable partly to 1922 and partly to 1923, or Section 1201 (b) referring to income attributable partly to 1923 and partly to 1924), declared that the tax should be a sum 25 per cent. less than the tax at the old 1921 rates; in other words, the law fixed and determined the 1923 rates at a sum equal to 75 per cent. of the old rates. What other law was "applicable thereto"?

So clear and definite was the legislative intent to extend to all persons paying a tax on income attributable to 1923 the benefit of the reduced rates, that even if Section 207 (b) were not so framed as to apply to the taxpayer whose income included a distributive share of partnership income attributable partly to 1923, his case would be covered by Section 1201 (a) in respect to income for a fiscal year beginning in 1922 and ending in 1923, and by Section 1201 (b) in respect to income for a fiscal year beginning in 1923 and ending in 1924. It is the latter section that would be applicable here. Section 1201 (b) provides:

> "Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period. * * *"

Manifestly this would apply to a taxpayer whose income consisted exclusively of fiscal year income. It could not be the intention of Congress to deny the benefit of the reduction to a taxpayer whose return also included ordinary income. The law made no provision for two separate returns, one of partnership or fiscal year income and one of calendar year income. The taxpayer had no alternative but to include his calendar year income in the same return with his fiscal year income. In the present case each of the returns was a fiscal year return, made on the blank provided by the department for fiscal year returns, and the peti-

tioner's calendar year income was separately stated on the same return. There was no other document in which it could have been stated. How could the petitioner be deprived of the reduction provided for by Section 1201 (b) because it so happened that his return included other income received in 1924 to which the new 1924 rates were applicable?

The amount of the tax computed under Section 1201 (b) differs slightly from its amount computed under Section 207 (b). The difference is slight, some $300 in each case. So manifest is the legislative intent to see that the reduction was made available to all taxpayers paying taxes on income attributable to 1923, whether calendar year income, fiscal year income or partnership income, that it is possible that the court might have to choose between two methods of computation. The practical difference between them is inconsequential. The government would deny relief under either, leaving the taxpayer whose income happened to be derived from a partnership having a fiscal year differing from the calendar year deprived of the benefit of the reduction under either section. This would be a plain flouting of the legislative intent.

Faced with this dilemma, the government falls back on the suggestion that such a partner gets under Section 1200 (a) a roughly compensatory reduction that on the average should approximate the reduction given to all other taxpayers. That is the section, quoted above, which provides that a taxpayer making return (in 1924) for the calendar year 1923 shall be entitled to the 25 per cent. reduction. If such a return includes a distributive share from a partnership having a fiscal year beginning in 1922 and

ending in 1923, then, it is claimed, this section is still applicable. But such a return would be made up in part of income attributable to 1922, a year for which no reduction in rates is suggested by the act. It would be a rough and ready slapstick method, giving the taxpayer in respect to 1922 income a reduction foreign to the uniformity of structure of the act, which makes no such reduction for other taxpayers, and, to balance this, denying to him any reduction whatever in respect to the 1923 portion of the next fiscal year—the year beginning in 1923 and ending in 1924. This simply balances one error against the other in the hope that the net result may be approximate exactitude! Furthermore, it disregards the fact that in many cases taxpayers may have had no 1922 income. It would be strikingly unjust to the taxpayer whose income increased from 1922 to 1924, and it would deny relief altogether to the taxpayer whose income was derived from a partnership formed in 1923. It is a crude unscientific short-cut, wholly at variance with the precise allocation of the tax according to the year to which the income was in fact attributable that distinguishes the careful and minute provisions of all the successive revenue acts in relation to fiscal years and partnership earnings.

As stated above, the Circuit Court of Appeals for the First Circuit holds the taxpayer in such cases entitled to the 25 per cent. reduction.

White v. *Maddison*, 45 Fed. (2d) 335.

The decision below in the present cases is in flat contradiction to the holding in the First Circuit.

Necessity of Authoritative Ruling

The conflict of authority now existing in the Circuit Courts of Appeals is one of serious importance. For every partnership formed in 1923 the decision of the court below in the case at bar deprives the taxpayer of any right whatever to participate in the benefit of the 25 per cent. reduction in 1923 rates granted by the Act of 1924. Such a taxpayer is left in a class by himself, penalized because his income happened to come through the channel of a partnership. The court will take judicial notice of the fact that many partnerships are formed each year, especially in the early months. Under this ruling every member of a partnership formed, for example, in March or April or May of 1923, is denied any share whatever in the reduction which Congress plainly intended to grant to every person paying a tax on income earned in 1923.

Until the present decision, the ruling in the First Circuit, recognizing the right of all taxpayers to share in a reduction of tax plainly intended for them all, stood as the authoritative guide for the department officials. The present decision sets up, in another circuit, a contrary rule. Such a conflict of authority, on a question of substantial moment, affecting thousands of taxpayers whose cases are now working their way up on the calendar of the Board of Tax Appeals, should not be allowed to continue.

October, 1931.

CHARLES HENRY BUTLER,
Counsel for Petitioners.

BAR PRESS, INC., 84-86 Washington Street, New York

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Supreme Court of the United States

October Term, 1931.

No. 470

WILLIAM A. W. STEWART, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI AND PETITIONER'S BRIEF ON APPLICATION.

CHARLES HENRY BUTLER,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1931

No.

WILLIAM A. W. STEWART, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of WILLIAM A. W. STEWART respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The Circuit Court of Appeals for the Second Circuit, by its decree entered July 24, 1931, has affirmed an order of the United States Board of Tax Appeals sustaining the

action of the Commissioner of Internal Revenue in determining a deficiency in the income tax of the petitioner for the year 1924. The precise question involved has also arisen in the First Circuit, where the Circuit Court of Appeals has decided adversely to the contention of the government. The decisions in the two circuits are in flat contradiction to each other.

There is no dispute as to the facts. The appellant made and filed his individual return of income of 1924, making his return for the calendar year. A substantial part of the appellant's income consisted of his distributive share, as a partner, of the partnership income of the law firm of Stewart & Shearer. The firm filed a partnership return on the basis of the fiscal year ending April 30, 1924. The appellant included in his individual return for the calendar year 1924 his distributive share of the partnership income for its fiscal year, thus including eight months income earned in 1923.

Former revenue acts had provided specifically for the case of a partnership return for a fiscal year made up of portions of two calendar years to which different rates were applicable. With slight modification of phraseology this provision was continued in the Revenue Act of 1924. By the provisions of Section 207(b) the tax imposed on an individual whose return included a distributive share of the income of a partnership reporting for a fiscal year of this kind conformed, as to the tax on such distributive share, to the rates applicable to the two portions of his partnership's fiscal year.

The rates applicable to income of 1923 were fixed by Section 1200, subd. (a), of the Revenue Act of 1924,

which, in the case of a taxpayer making a return for that calendar year, gave him a refund or credit, as the case might require (depending on whether or not he had paid the tax), of 25 per cent of the amount of the tax under the Revenue Act of 1921. The reduced rates thus made applicable to incomes of 1923 were not identical with those for 1924 imposed by the same act of 1924, so that a fiscal year expiring April 30, 1924, was made up of portions of two calendar years to which different rates were applicable.

Further provisions for insuring to the person paying a tax in respect to income earned or accruing in 1923 but returned in a return for a fiscal year different from the calendar year 1923 were made by Sections 1201(a) and 1201(b) of the act of 1924. Section 1201(a) provided for the case of a taxpayer making a return for a fiscal year beginning in 1922 and ending in 1923, and Section 1201(b) for that of a taxpayer making a return for a fiscal year beginning in 1923 and ending in 1924. In each case a credit of 25 per cent was allowed for that part of the tax corresponding to the portion of the fiscal year falling within 1923.

The government has contended that none of these sections gave relief to a taxpayer in the situation of the appellant, that is, of one who made a return for the calendar year 1924 of income which included his distributive share of partnership earnings for a fiscal year falling partly within 1923 and partly within 1924, and has refused to allow claims for refund or claims in abatement based thereon. The question was squarely presented in *Maddison* v. *White* (40 Fed. (2d) 564), where the District Court for

the District of Massachusetts overruled the government's contention and held that a taxpayer whose 1924 income included a partnership distributive share of the kind above stated was entitled to the 25 per cent reduction. This decision was unanimously affirmed by the Circuit Court of Appeals for the First Circuit, *White* v. *Maddison,* (45 Fed. (2d) 335).

The present proceeding was initiated and brought before the Board of Tax Appeals prior to the decision of the *Maddison* case. The Board upheld the government's contention and refused to allow the taxpayer the 25 per cent reduction. Thereafter by petition for review the case was duly brought before the Circuit Court of Appeals for the Second Circuit. Meanwhile the decision had been rendered in the *Maddison* case, but in the present case the Circuit Court of Appeals for the Second Circuit declined to follow the decision of the Circuit Court of Appeals for the First Circuit in the *Maddison* case, and affirmed the action of the Board. It is to review this decision that the present application for certiorari is made.

B

Reasons Relied on for the Allowance of the Writ

1. The sole question is whether the 25 per cent reduction in the tax on 1923 income granted by the Revenue Act of 1924 should be taken into consideration in computing the tax income reported by an individual for the calendar year 1924, as a share of profits or income attributable to 1923 from a partnership whose fiscal year ended

April 30, 1924. The text of the several sections of the act above referred to, under which the reduction is claimed, is set forth in the petitioner's brief on this application presented herewith.

2. The decision of the court below is as above stated in irreconcilable conflict with that made by the Circuit Court of Appeals for the First Circuit on a state of facts practically identical with that in the case at bar. Under circumstances precisely similar to those here presented, the Circuit Court of Appeals in the First Circuit holds that the taxpayer is entitled to the benefit of the 25 per cent reduction. No certiorari to review that decision was applied for, and the time for such application has long since expired. Until the conflicting decision in the case at bar, the ruling in *White* v. *Maddison* stood as the controlling judicial interpretation of the law on this subject.

3. These conflicting decisions make the present state of the law one of hopeless confusion. Of two taxpayers having incomes identical in kind and received from precisely similar sources, the taxpayer in one part of the country finds his income tax burden substantially different in rate from that of the other taxpayer, residing in another part of the country. One receives a 25 per cent credit on the tax on income accrued in 1923 and the other does not. This conflict of law is bad enough for those in the First and Second Circuits, but at least each knows for what tax he will be held liable, although there is one law for the First Circuit and another for the Second, but in the remaining seven circuits it is impossible for taxpayers simi-

larly situated to know the amount of their tax, for they are confronted by judicial precedents diametrically opposed yet of equal authority. Until this conflict of authority be resolved, taxes, so far as this particular kind of tax is concerned, have ceased to be "uniform within the United States." The conflict is not only irreconcilable but of general interest and substantial in scope, for there are throughout the country many thousands of partnerships that keep their books on a fiscal year not identical with the calendar year, and many cases as yet undetermined involving the application of the 25 per cent credit granted on the lowering of the rates in 1924.

4. The decision below is thus flat in the face of what has hitherto been the controlling authority, "from which," says the court below, "with all deference, we feel compelled to differ" (Rec. p. 42).

5. Whether the court below was warranted in refusing to taxpayers in the Second Circuit the relief which the courts award them in the First is considered in our brief submitted with this petition. But whatever may be said in favor of the decision in the Second Circuit, the question should not be left in this state of hopeless confusion. Only by granting a writ of certiorari can this conflict of authority be remedied.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit

Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 29,229, William A. W. Stewart, *v.* Commissioner of Internal Revenue, and that the said decree of the said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

October, 1931.

WILLIAM A. W. STEWART,

By CHARLES HENRY BUTLER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1931

WILLIAM A. W. STEWART

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

GEORGE L. SHEARER

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

BRIEF FOR PETITIONERS ON APPLICATIONS FOR WRITS OF CERTIORARI

These are applications for certiorari to review two decrees of the Circuit Court of Appeals for the Second Circuit entered July 24, 1931, one affirming a determination of the

Board of Tax Appeals adjudging a deficiency of $7,435.71 on the income tax of the petitioner William A. W. Stewart for 1924, and the other affirming a like determination in the case of the petitioner George L. Shearer in the sum of $8,488.18 for the same year. The sole question in each case relates to the applicability to the petitioner of the 25 per cent. reduction in rates of income tax made by the Revenue Act of 1924.

The two cases were heard together in the court below and a single opinion written covering both cases. A separate application for certiorari is made and a separate record presented in each case, but as the question presented is identical in both cases, the brief is identical and is therefore entitled in both cases.

The opinion below has not yet been reported in the official reports or elsewhere.

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Jurisdiction

Jurisdiction to review is conferred by Section 347 of the Judicial Code, providing that in any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court, upon the petition of any party thereto, to require by certiorari that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the case had been brought there by unrestricted writ of error or appeal. The decrees below were entered July 24, 1931, and these applications are made within the three months prescribed by Section 350 of the Judicial Code.

Each of the present cases is one of those specified in Rule 38 par. 5, subd. (b), "where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter." It is further submitted by the petitioner in each case that apart from this fact the case is one of those mentioned in such subdivision as one wherein the court below has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and has decided an important question of federal law which has not been, but should be, settled by this court.

Statement of Case

The petitioners are members of the partnership of Stewart & Shearer, with offices at No. 45 Wall Street, New York City. In 1925 they made and filed their individual income tax returns for 1924 on a basis of a fiscal year as to

their partnership income and of a calendar year as to their other income. In each case the return was made on the "Fiscal Year" blank form. The additional taxes imposed are assessed for the calendar year 1924. The partnership of Stewart & Shearer made and filed a partnership return of income on the basis of a fiscal year ending April 30, 1924. The petitioners included in their individual returns for the year 1924 their distributive shares of the partnership profits for its fiscal year ending April 30, 1924, thus including eight months of such profits earned in 1923.

The Commissioner correctly found the tax on income attributable to 1923, at the old 1923 rates before the reduction thereof effected by Section 1200 (a) of the Revenue Act of 1924, to be $23,732.92 in the case of petitioner William A. W. Stewart (Rec., fol. 59), and $27,244.32 in the case of petitioner George L. Shearer (Rec., fol. 56). In computing the tax on that portion of the income to which the rates for the calendar year 1923 applied he did not allow either of the petitioners the benefit of the reduction of 25 per cent. provided for by Sections 1200 (a) and 1201 (b) of the Revenue Act of 1924. The allowance of such 25 per cent. would result in a reduction of the tax claimed on income attributable to 1923 by $5,933.23 in the case of petitioner William A. W. Stewart and by $6,811.08 in the case of petitioner George L. Shearer.

The Commissioner's determination was in each case approved by the Board of Tax Appeals (Rec., Stewart, fols. 60, 62-66; Shearer, fols. 57, 61-63), and on review by the Circuit Court of Appeals for the Second Circuit the Board's determination was affirmed (Stewart, p. 44; Shearer, p. 42).

Statutes Involved

The pertinent provisions of the Revenue Act of 1924 are as follows:

Sec. 207 (b):

"If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then

"(1) The rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and

"(2) The rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

"In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year."

Sec. 218 (a):

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

"There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed."

Sec. 1200:

"(a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return."

Sec. 1201:

"(a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923, is of the entire period."

Conflict of Decisions in the Circuit Courts of Appeals

In *White* v. *Maddison* (45 Fed. (2d) 335, affirming *Maddison* v. *White*, 40 Fed. (2d) 564), arising on a state of facts practically identical with that in the cases at bar, it was held by the Circuit Court of Appeals for the First Circuit that an individual making a return for the calendar year 1924 whose income as returned included his distributive share of a partnership making a return for a fiscal year beginning in 1923 and ending in 1924, was entitled to the 25 per cent. reduction of the tax on that part of the income attributable to 1923. The decisions of the Circuit Courts of Appeal in the First and Second Circuits are thus in irreconcilable conflict. In its opinion below the court refers to the decision in the *Maddison* case as one "from which with all deference, we feel compelled to differ" (Stewart p. 42; Shearer, p. 40).

On these applications we respectfully submit that the question being one on which there is admittedly hopeless conflict of authority in the two circuits, and one of general interest and substantial in scope, partnership returns for fiscal years being of wide use throughout the country and the determination of the proper tax being one demanded in

a vast number of such cases, the law should be settled by this court.

It is unnecessary to present any argument on the ground of conflict of authority. The conflict is patent and not disputed. Its general interest and wide scope are apparent on a mere statement of the issue. It may be proper to summarize briefly the considerations on which we urge that the decision in the present cases is erroneous in law and should be reversed and the rule as laid down and applied in the First Circuit approved.

Specification of Errors

I. The Circuit Court of Appeals erred in holding that the rates of tax on income of 1923 as used in Section 207 (b) of the Revenue Act of 1924 were the rates imposed by the Revenue Act of 1921 irrespective of the reduction in those rates effected by the Revenue Act of 1924.

II. The Circuit Court of Appeals erred in holding that the 25 per cent. reduction in tax provided by Title XII of the Revenue Act of 1924 does not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

III. The Circuit Court of Appeals erred in failing to allow the petitioners a credit of 25 per cent. of the tax on that portion of the partnership income shown on their returns for 1924 which was attributable to the year 1923.

IV. The Circuit Court of Appeals erred in holding that the returns for the calendar year 1924 wherein the petitioners included their distributive shares of the profits or income of a partnership having a fiscal year beginning in 1923 and ending in 1924 were not within the purview of Section 1201 (b) of the Revenue Act of 1924.

V. The Circuit Court of Appeals erred in each case in affirming the determination of the Board of Tax Appeals.

Summary of Argument

The 25 per cent. reduction in rates made by Congress by the Revenue Act of 1924 was operative in respect to the tax on all income earned in 1923 and attributable to that year.

The unbroken policy of the successive revenue acts has been to preserve the identity of the year to which income is attributable and to tax it at the rates applicable to such year.

The rates applicable by law to 1923 were 75 per cent. of the 1921 rates.

The act of 1924, like the previous acts, contained minute and careful provisions assuring to the fiscal year taxpayer and the partner the same reduction granted to other taxpayers.

The decision below is in flat contradiction to the correct rule as declared and applied in the First Circuit.

Argument

When a reduction of taxes was determined upon in the early months of 1924 it was the intention to grant a deduction in the taxes on 1923 income whenever paid,—the taxes, that is, imposed in respect to income earned, received or accrued during any and every part of the calendar year 1923. In other words, the tax charge on income of 1923 was to be reduced. "But," as the court below points out in its opinion (Rec., Stewart, p. 39; Shearer, p. 37), "as the bill was not ready for passage until after the returns for 1923 income had been filed, it was thought best to limit the relief to 1923 income to a credit or refund of 25 per cent." This 25 per cent. credit on a tax already reported was the only practicable way, in respect to 1923 income returned in 1924, of giving a benefit approximately equal to the reduction in rates applicable to the tax on income of subsequent years. To attempt to undo all the returns that had been filed and on which taxes had already been wholly or partially paid in March 1924 and recompute the tax would have resulted in utter chaos.

In the administration of the successive revenue acts it had long been a familiar occurrence that the fiscal year of a taxpayer, or the fiscal year of his partnership, frequently differed from the calendar year, so that the income actually received by a taxpayer in any particular calendar was made up in part of income attributable to that year and in part of income attributable to the preceding year. In such cases, not only the revenue act in force when the amendment of 1924 was undertaken, but the older acts as well, had, in pur-

suance of an unbroken policy, provided that in cases where the taxpayer's fiscal year, or his partnership's fiscal year, differed from the calendar year, the incidence of taxation should be in accord with the time the income was actually earned rather than with the time it happened to be received by the taxpayer. This principle had long been an integral part of the structure of the income tax laws. When rates of tax had been changed the change had always taken effect at the beginning of a calendar year, and when the taxpayer's fiscal year was identical with the calendar year the change was operative automatically. But when the taxpayer's fiscal year, or his partnership's fiscal year, differed from the calendar year, in such cases the law had carefully preserved the identity of the income in accordance with the year to which it had been attributable, and the applicable rates of tax had been the rates applicable to such year and not to the year in which it had happened to be received. Thus if a taxpayer had had a fiscal year ending June 30, 1922, in making his return in 1923 of income of 1922 he would show the receipt of his income for the fiscal year ending June 30, 1922, but the law separated this into its components, attributing half of it to the six months which fell within the calendar year 1921 and half to the six months ending June 30, 1922, and the tax on the 1921 half was at the 1921 rates and that on the 1922 half at the 1922 rates.

Thus in the Revenue Act of 1918 it was provided by Section 205 (a),

> "That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue

> Act of 1916 * * * which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period."

Section 205 (b) of the same act of 1918 made similar provision in the case of a taxpayer making a return for a fiscal year beginning in 1918 and ending in 1919.

Both these provisions were carried with practically no change, other than the necessary new specification of years, into the Revenue Act of 1921, preserving the same section and subdivision numbers. In the act of 1924 the same provisions were continued, except that instead of being confined to the single change in rates effected by a specified statute they were made applicable in general terms to any statutory change in rates. The two paragraphs were thus merged in one, which takes the Section number 207 (a). It may be noted that this provision has continued practically unchanged in the subsequent revenue acts, as Section 207 (a) in the act of 1926 and Section 105 in that of 1928.

The unbroken policy of our revenue legislation thus carefully required and preserved the identification, for tax purposes, of income according to the year to which it was attributable and imposed the rates of tax applicable to such year. Probably these provisions might of themselves have been sufficient to provide for the segregation, for tax purposes, of a taxpayer's income that came in the form of his distributive share of earnings of a partnership having a fiscal year different from the calendar year. The succes-

sive acts, however, specifically provided for that particular kind of fiscal year income. In the act of 1918, Section 205 (c) provided that if a partnership fiscal year began in 1917 and ended in 1919, then the rates for the calendar year in which the fiscal year began should apply to that part of the income for the fiscal year which bore, to the whole of such income, the same proportion which the portion of the fiscal year falling in the first calendar year bore to the whole fiscal year; and that the rates for the calendar year in which the fiscal year ended should apply to the remainder of the income. The amount of the tax thus computed would differ slightly from the tax if computed under the general fiscal year provisions of Section 205 (a) above quoted.

This provision of the act of 1918 for the case of a partnership fiscal year was carried practically unchanged, except for the necessary change in designation of years, into the Revenue Act of 1921, retaining the same section number, and thence into the act of 1924, (the statute applicable to the cases at bar) as Section 207 (b), except that the provision was now expressed in general terms applicable to any change in rates instead of being confined to one specified statutory change, and a provision was added showing how, in such a return, the taxpayer's income other than his partnership distributive share was to be treated. As thus generalized and amplified the provision has been preserved in the subsequent act of 1926 as Section 207 (b) and in that of 1928 as Section 182 (b).

It was thus the uniform policy of the successive revenue acts, in cases where by reason of the taxpayer, or his partnership, keeping a fiscal year different from the calendar year, the income was attributable to parts of differ-

ent calendar years, to preserve the identity of the income attributable to the two calendar years portions of which made up the whole and to charge each portion with the rates for the year to which it was attributable.

Had the revenue act of 1924 been completed and become a law substantially in advance of the compilation by the taxpayers of their returns to be made by March 15 of that year, Congress would have had to do no more than reenact the provisions above quoted. But as above noted the bill was not ready for passage until the returns had been filed, the taxes computed and at least 25 per cent. thereof paid. So in respect to taxes on 1923 income included in those returns tax relief was given by a lump sum credit or refund of 25 per cent., an amount approximately, but not precisely, equivalent to the reduction in rates made effective for subsequent years. In order to harmonize the machinery of the new statute with the practice under the old in cases where the taxpayer or his partnership kept a fiscal year different from the calendar year, the 25 per cent. credit or refund was made to apply to that part of the income, whenever received or returned, which was attributable to 1923.

Manifestly his return for 1924, filed in 1925, would be the only place or occasion in respect to which a taxpayer would get his reduction in the tax on the 1923 part of any income accruing partly in 1923 and partly in 1924. It would of necessity be in the return filed in 1925 that the return of such income would appear.

As it was impracticable to require a new return and a recomputation of the tax, Congress fixed and determined the rates applicable to 1923 by a simple provision as follows:

"Sec. 1200 (a) Any taxpayer making return,

for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return. * * *"

The rates applicable to 1923 were thus fixed and determined as the rates of 1921 less 25 per cent.

This was of itself sufficient to provide for the case of a taxpayer whose income included the distributive share of the earnings of a fiscal year partnership. Section 207 (b) of the same act of 1924, which as we have seen merely reenacted in general terms a long familiar statutory provision theretofore expressed in terms of specific years, provided as follows:

"If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then

"(1) The rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and

"(2) The rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

"In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year."

In the return of each of the petitioners for 1924 (made in 1925) receipt was shown of the distributive share of the earnings of a partnership having a fiscal year ending April 30, 1924. Such fiscal year began in 1923, and in the language of the act the rates for the calendar year during which such fiscal year began were declared to apply to the portion of such income attributable to 1923 "determined under the law applicable to such calendar year," *i. e.*, to 1923. The "law applicable" to 1923 was the law which in Section 1200 (a) above quoted made the 1923 rates 25 per cent. less than those under the act of 1921. What other law was applicable to 1923? Every section in the act of 1924 that provided for a computation of the tax on income of 1923 (whether Section 1200 (a) referring to the ordinary return, Section 1201 (a) referring to a return of income attributable partly to 1922 and partly to 1923, or Section 1201 (b) referring to income attributable partly to 1923 and partly to 1924), declared that the tax should be a sum 25 per cent. less than the tax at the old 1921 rates; in other words, the law fixed and determined the 1923 rates at a sum equal to 75 per cent. of the old rates. What other law was "applicable thereto"?

So clear and definite was the legislative intent to extend to all persons paying a tax on income attributable to 1923 the benefit of the reduced rates, that even if Section 207 (b) were not so framed as to apply to the taxpayer whose income included a distributive share of partnership income attributable partly to 1923, his case would be covered by Section 1201 (a) in respect to income for a fiscal year beginning in 1922 and ending in 1923, and by Section 1201 (b) in respect to income for a fiscal year beginning in 1923 and ending in 1924. It is the latter section that would be applicable here. Section 1201 (b) provides:

> "Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period. * * *"

Manifestly this would apply to a taxpayer whose income consisted exclusively of fiscal year income. It could not be the intention of Congress to deny the benefit of the reduction to a taxpayer whose return also included ordinary income. The law made no provision for two separate returns, one of partnership or fiscal year income and one of calendar year income. The taxpayer had no alternative but to include his calendar year income in the same return with his fiscal year income. In the present case each of the returns was a fiscal year return, made on the blank provided by the department for fiscal year returns, and the peti-

tioner's calendar year income was separately stated on the same return. There was no other document in which it could have been stated. How could the petitioner be deprived of the reduction provided for by Section 1201 (b) because it so happened that his return included other income received in 1924 to which the new 1924 rates were applicable?

The amount of the tax computed under Section 1201 (b) differs slightly from its amount computed under Section 207 (b). The difference is slight, some $300 in each case. So manifest is the legislative intent to see that the reduction was made available to all taxpayers paying taxes on income attributable to 1923, whether calendar year income, fiscal year income or partnership income, that it is possible that the court might have to choose between two methods of computation. The practical difference between them is inconsequential. The government would deny relief under either, leaving the taxpayer whose income happened to be derived from a partnership having a fiscal year differing from the calendar year deprived of the benefit of the reduction under either section. This would be a plain flouting of the legislative intent.

Faced with this dilemma, the government falls back on the suggestion that such a partner gets under Section 1200 (a) a roughly compensatory reduction that on the average should approximate the reduction given to all other taxpayers. That is the section, quoted above, which provides that a taxpayer making return (in 1924) for the calendar year 1923 shall be entitled to the 25 per cent. reduction. If such a return includes a distributive share from a partnership having a fiscal year beginning in 1922 and

ending in 1923, then, it is claimed, this section is still applicable. But such a return would be made up in part of income attributable to 1922, a year for which no reduction in rates is suggested by the act. It would be a rough and ready slapstick method, giving the taxpayer in respect to 1922 income a reduction foreign to the uniformity of structure of the act, which makes no such reduction for other taxpayers, and, to balance this, denying to him any reduction whatever in respect to the 1923 portion of the next fiscal year—the year beginning in 1923 and ending in 1924. This simply balances one error against the other in the hope that the net result may be approximate exactitude! Furthermore, it disregards the fact that in many cases taxpayers may have had no 1922 income. It would be strikingly unjust to the taxpayer whose income increased from 1922 to 1924, and it would deny relief altogether to the taxpayer whose income was derived from a partnership formed in 1923. It is a crude unscientific short-cut, wholly at variance with the precise allocation of the tax according to the year to which the income was in fact attributable that distinguishes the careful and minute provisions of all the successive revenue acts in relation to fiscal years and partnership earnings.

As stated above, the Circuit Court of Appeals for the First Circuit holds the taxpayer in such cases entitled to the 25 per cent. reduction.

White v. *Maddison*, 45 Fed. (2d) 335.

The decision below in the present cases is in flat contradiction to the holding in the First Circuit.

Necessity of Authoritative Ruling

The conflict of authority now existing in the Circuit Courts of Appeals is one of serious importance. For every partnership formed in 1923 the decision of the court below in the case at bar deprives the taxpayer of any right whatever to participate in the benefit of the 25 per cent. reduction in 1923 rates granted by the Act of 1924. Such a taxpayer is left in a class by himself, penalized because his income happened to come through the channel of a partnership. The court will take judicial notice of the fact that many partnerships are formed each year, especially in the early months. Under this ruling every member of a partnership formed, for example, in March or April or May of 1923, is denied any share whatever in the reduction which Congress plainly intended to grant to every person paying a tax on income earned in 1923.

Until the present decision, the ruling in the First Circuit, recognizing the right of all taxpayers to share in a reduction of tax plainly intended for them all, stood as the authoritative guide for the department officials. The present decision sets up, in another circuit, a contrary rule. Such a conflict of authority, on a question of substantial moment, affecting thousands of taxpayers whose cases are now working their way up on the calendar of the Board of Tax Appeals, should not be allowed to continue.

October, 1931.

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Supreme Court of the United States

OCTOBER TERM, 1931

Nos. 470–469

WILLIAM A. W. STEWART,

Appellant,

against

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

GEORGE L. SHEARER,

Appellant,

against

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

WILLIAM A. W. STEWART, *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 470
GEORGE L. SHEARER, *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 469

PETITIONERS' BRIEF

Opinions Below

Stewart *v.* Commissioner, Board of Tax Appeals: 18 B. T. A. 393;

Stewart *v.* Commissioner, United States Circuit Court of Appeals for the Second Circuit: 52 F. (2d) 17.

Jurisdiction

These appeals are taken from judgments of the United States Circuit Court of Appeals for the Second Circuit, filed July 24, 1931 (R-29), which judgments affirmed orders of the United States Board of Tax Appeals entered November 30, 1929 (R-11), which denied claims for overpayment of taxes on income accruing in 1923 of $7,435.71 in the case of William A. W. Stewart, and $8,488.18 in the case of George L. Shearer (R-12). Petitions were duly presented to this Court by the said William A. W. Stewart and George L. Shearer for writs of certiorari, and orders allowing the same were filed herein on November 30, 1931 (R-31). The applications for certiorari were made within three months after the filing of the judgments in the Circuit Court of Appeals as provided by Section 350 of the Judicial Code.

Statement of Facts

The Board of Tax Appeals made the following findings of fact (R-10):

> "The petitioners are individuals and residents of New York, with their offices located at 45 Wall Street, New York City. They made and filed their individual income tax returns on the basis of a calendar year.
>
> "The partnership of Stewart & Shearer, whose members are the petitioners herein, made and filed a partnership return of income on the basis of a fiscal year ended April 30, 1924.

"The respondent determined the net income of petitioner Shearer for the calendar year 1924, to be $103,613.53 of which amount $67,462.38 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924 was $3,071.67, and that the tax on the income attributable to 1923 was $27,244.32.

"The respondent determined the net income of petitioner Stewart for the calendar year 1924, to be $91,165.35, of which amount $71,462.39 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924, was $688.43, and that the tax on the income attributable to 1923 was $23,732.92."

Each of the petitioners claimed before the Commissioner the right to receive the 25% reduction of the tax on that portion of the partnership income attributable to the year 1923. These claims were rejected by the Commissioner of Internal Revenue, and on appeal the Board of Tax Appeals sustained the determination of the Commissioner. Petitions were presented in each case to the United States Circuit Court of Appeals for the Second Circuit for review of the decisions of the Board of Tax Appeals, and that Court affirmed the decision of the Board. Petitions for certiorari to review the determinations of the Circuit Court of Appeals were filed in this Court on October 19, 1931, and writs of certiorari were granted by this Court on November 30, 1931.

Specification of Errors

It is intended to urge in each case the following assigned errors (R-15):

1. The Board erred in holding that the twenty-five per cent. reduction in tax provided by Title XII of the Revenue Act of 1924 does not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

2. The Board erred in failing to allow the petitioner a credit of twenty-five per cent. of the tax on that portion of the partnership income shown on his return for 1924 which was attributable to the year 1923.

3. The Board erred in rendering a decision for the respondent.

Statutes Involved

Revenue Act of 1924:

"Sec. 218. (a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the part-

nership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed."

Title XII—Reduction of Income Tax Payable in 1924:

"Sec. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

"Sec. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable

to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period."

Other statutes referred to, as well as those above quoted, are printed in the Appendix to this brief.

Summary of Argument

I. The 25% reduction in 1923 income taxes provided for in the Revenue Act of 1924 applied to all taxes on income accruing in 1923 and was not confined to income taxes *payable* in 1924.

(a) Partnership income is merely individual income to be returned in every case by individual members on their individual returns.

(b) The Revenue Act of 1924 granted a reduction of 25% of the taxes on all 1923 income whenever returned.

II. The provisions of Sec. 207(b) and Sec. 1201(b) of the 1924 Act are not inconsistent.

III. If Sec. 1201(b) is inapplicable and we look alone to Sec. 207(b), the rates applicable to 1923 referred to in that section are the 1921 rates less 25 per cent.

IV. The government's contention that taxpayers with 1923-1924 fiscal year partnership income were deprived of the reduction but received a compensating equivalent by a

reduction on their 1922 tax is untenable. The statute permits no such deduction.

V. To refuse the reduction in taxes on 1923 partnership income reported in 1924 returns would violate the Fifth Amendment to the Constitution of the United States.

ARGUMENT

POINT I

The 25% reduction in 1923 income taxes provided for in the Revenue Act of 1924 applied to all taxes on income accruing in 1923 and was not confined to income taxes payable in 1924.

This proposition is decisive of the question here presented. The opinion of the Circuit Court of Appeals in these cases (52 Fed. (2d) p. 17) is founded on the assumption that the 25% reduction was granted only in respect to taxes payable in 1924. If this were so all that would have been necessary to do would have been to provide that all taxes payable in 1924 should be reduced 25%. Instead the Act provides in Sec. 1201(a) for a reduction of a proportion of taxes payable in 1924, on income of 1923 when reported with income of 1922 and in Sec. 1201(b) for a similar reduction in taxes payable in 1925, on 1923 income when reported with 1924 income.

The title giving the reduction (Title XII) is headed "Reduction of Income Tax Payable in 1924" but the provisions of the sections granting the reduction show the title

to be inaccurate, for any income for a period beginning in 1923 and ending in 1924 would be reported in a return to be filed on or before March 15, 1925, as provided in Sec. 218 (a), and Sec. 1201(b) specifically provides for a 25% reduction of the tax on such income, although that tax would be payable in 1925.

Income received from a partnership having a fiscal year different from the calendar year is taxable as of the year to which it is attributable. The Revenue Act of 1924, which reduced the tax on incomes of 1923, assured to every taxpayer paying a tax on income attributable to 1923 a reduction of his tax. To the appellants this reduction has been denied by the court below.

Throughout every Revenue Act, the recognition of the income *accruing* in a calendar year as the subject of taxation, irrespective of the time of receipt by the taxpayer is uniform and emphatic. It is this consideration which led the Circuit Court of Appeals for the First Circuit to render its decision in *White* v. *Maddison* (45 F. (2d) 335) which the Court for the Second Circuit has refused to follow in these cases, basing its reasoning largely on the assumption that the 25% reduction was confined to taxes payable in 1924.

The unbroken policy of our revenue legislation has carefully required and preserved the identification, for tax purposes, of income according to the year to which it was attributable and imposed the rates of tax applicable to such year. In cases where by reason of the taxpayer or his partnership keeping a fiscal year different from the calendar year, the income was attributable to parts of different calendar years, it has been the uniform policy of the succes-

sive revenue acts to preserve the identity of the income attributable to the two calendar years portions of which made up the whole and to charge each portion with the rates for the year to which it was attributable.

In the administration of the successive revenue acts it has long been a familiar occurrence that the fiscal year of a taxpayer, or the fiscal year of his partnership, frequently differed from the calendar year, so that the income actually received by a taxpayer in any particular calendar year was made up in part of income attributable to that year and in part of income attributable to the preceding year. In such cases, not only the revenue act in force when the amendment of 1924 was undertaken, but the older acts as well, have, in pursuance of an unbroken policy, provided that in cases where the taxpayer's fiscal year, or his partnership's fiscal year, differs from the calendar year, the incidence of taxation shall be in accord with the time the income was actually earned rather than with the time it happened to be received by the taxpayer. This principle has long been an integral part of the structure of the income tax laws. When rates of tax have been changed the change has always taken effect at the beginning of a calendar year, and when the taxpayer's fiscal year is identical with the calendar year the change is operative automatically. But when the taxpayer's fiscal year, or his partnership's fiscal year, differs from the calendar year, in making any change of rates the law has always carefully preserved the identity of the income in accordance with the year to which it has been attributable, and the applicable rates of tax have always been the rates applicable to such year.

It was only in the case of partnerships that both calendar and fiscal year income would be included in the same return, so that it was for partners' individual returns that special provision had to be made in regard to fiscal year income when reported with calendar year income, more especially when the tax rates changed because of increases or reductions. In every Revenue Act some provision more or less arbitrary has been made for a method which would accomplish what was regarded as a fair computation of tax on both calendar and fiscal year income.

(*a*)

PARTNERSHIP INCOME IS MERELY INDIVIDUAL INCOME TO BE RETURNED IN EVERY CASE BY INDIVIDUAL MEMBERS ON THEIR INDIVIDUAL RETURNS.

There is no recognition in the income tax Acts of partnership income as itself an independent subject of taxation. Sec. 218(a) of the Act of 1924 says, "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

Returns are required to be made by partnerships by Sec. 224, which is taken from earlier acts, but only for the purpose of giving information as to the partner's share of the profits and Sec. 218(a) requires the individuals to return such income whether or not withdrawn from the partnership—this, of course, to prevent evasion of taxation by allowing profits to accumulate in the firm—but in every

respect partnership income is only the income of the individual partners. Some confusion appears in the opinion below because of Sec. 207(b) which provides for apportioning taxes between years where partnership fiscal year and individual calendar year income are reported together. This section, however, does not create a separate entity of partnership income; it merely provides, where fiscal and calendar year incomes are reported together, for apportioning the former between the calendar years to which its component parts are attributable and imposing on each component a tax at the rates applicable to that calendar year. The section might just as well have read, "Where income for a fiscal year is reported with calendar year income in the same return" instead of "If a fiscal year of a partnership begins in one calendar year and ends in another calendar year."

An individual's income received from a partnership remains individual income—it may be for a fiscal year differing from a calendar year—and a partner may have, and usually has, other income reported for a calendar year, but the income from the partnership remains nevertheless nothing but the partner's individual income for the tax on which he is liable *only in his individual capacity.*

The Court may take judicial notice that many partnerships are formed each year after January 1st and in every case having a fiscal year where a partnership was formed in 1923 after that date the interpretation placed on the statute by the court below would deprive all partners in those firms of the 25% reduction on their 1923 partnership income.

Some such cases are pending in the courts, but just how many cannot be ascertained. Among them are *Westfeldt* v. *Commissioner of Internal Revenue* in the Circuit Court of Appeals for the Fifth Circuit, *Shannon and Fuchs* v. *Commissioner of Internal Revenue* in the Circuit Court of Appeals for the District of Columbia and *Rogers* v. *Anderson* and *Woody* v. *Bowers* in the District Court for the Southern District of New York. How many individuals have borne this injustice without protest is unknown, but the fact, if true, that all had submitted without complaint, would not tend to prove that such an unfair construction was correct.

(*b*)

THE REVENUE ACT OF 1924 GRANTED A REDUCTION OF 25% OF THE TAXES ON ALL 1923 INCOME WHENEVER RETURNED.

The relevant sections of the 1924 Act which gave to taxpayers the 25% reduction in taxes on 1923 income read as follows:

"TITLE XII. REDUCTION OF INCOME TAX PAYABLE IN 1924.

"Sec. 1200(a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

"Sec. 1201(a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923,

of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923, and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period."

In providing for this 25% reduction, three situations were considered:

First, where returns had been filed March 15, 1924, showing income only for the calendar year 1923. These were the simplest cases, and Section 1200(a) provided for a flat 25% reduction of the tax shown upon those returns.

Second, where returns filed March 15, 1924, included income accruing both in 1922 and 1923, because of the use of a fiscal year commencing in 1922, and ending in 1923. Those cases were provided for in Section 1201(a) which gave taxpayers a reduction of 25% of the tax on the income, shown by those returns, which accrued in 1923.

Third, where returns which were to be filed March 15, 1925, should include income accruing both in 1923 and 1924, because of the use of a fiscal year beginning in 1923, and

ending in 1924. In those cases Section 1201(b) gave taxpayers a reduction of 25% of the tax on the income, shown by those returns, which accrued in 1923.

If these petitioners had used the same fiscal year for their individual income as was used by the firm and had made a return in 1925, on the same fiscal year basis as the partnership, they would have returned individual and partnership income for eight months of 1923 and four months of 1924, and would have been entitled, under the explicit language of Section 1201(b), to a 25% reduction of the tax, at 1923 rates, on the income for that year. The mere fact that in their individual return on a calendar year basis they were required to show their partnership income on a fiscal year basis under the provisions of Section 218(a), does not alter the situation. The petioners' returns were on a calendar year basis as to individual income and on a fiscal year basis to to partnership income, and Section 1201(b), by express terms, gives them a 25% reduction of tax on the 1923 income shown on the fiscal year basis. It is not necessary to read any words into these sections granting the reduction. It is only necessary to keep in mind the actual facts. The law itself provides that "individuals carrying on business in partnership shall be liable for income tax only in their individual capacity" (Sec. 218a). What the petitioners did was to make a combined return including partnership income on a fiscal year basis and individual income on a calendar year basis. So far as the individual income was concerned, no case was presented for reduction in tax, for that income all accrued in 1924, but so far as partnership income was con-

cerned, two-thirds accrued in 1923, and one-third accrued in 1924. Because of the express statutory requirement that this partnership income should be reported in this way in returns of income received in 1924, the petitioners had no choice. The returns themselves clearly showed the facts. The 1924 income tax Form 1040 contained separate columns for income taxable at 1923 rates and for income taxable at 1924 rates, clearly recognizing that it was necessary to separate the income accruing in the different years because of this tax reduction on 1923 income. The law's requirement that such returns must combine in a single year both calendar year individual income and fiscal year partnership income does not alter, but on the contrary emphasizes, the two-fold nature of the subject matter of those returns. They were, in fact, two returns consolidated,—one of individual income for the calendar year and the other of partnership income for the fiscal year, and so far as the partnership income for the fiscal year was concerned, Section 1201(b) gave the taxpayers the absolute right, by its express language, to a 25% reduction of the tax on 1923 income.

The Commissioner determined that the tax, at rates fixed by the 1921 Act on the petitioner Stewart's 1923 partnership income was $23,732.92 and on the petitioner Shearer's 1923 partnership income was $27,244.32, but he refused to allow the taxpayers the 25% reduction in the tax on 1923 income.

This precise question has been determined in the case of *White, Collector of Internal Revenue* v. *Maddison* (45 F. 2d, 335) where the United States Circuit Court of Appeals

for the First Circuit, on a state of facts identical with those in the cases at bar, ruled that the taxpayer was entitled to the same reduction in tax as is here claimed.

In that case the taxpayer reported for 1924 $99,000 representing his share of partnership profits for the fiscal year beginning October 1, 1923, and ending September 30, 1924, and at the same time reported his individual income for the calendar year 1924. The taxpayer's return included, therefore, three-twelfths of his partnership profits which accrued in the year 1923. The Commissioner refused to allow him a 25% reduction in the tax on this three-twelfths of the partnership profits and he brought an action, against the Collector, in the United States District Court for the District of Massachusetts. Judge LOWELL decided that he was entitled to the reduction claimed, in an opinion reported *sub. nom. Maddison* v. *White, Collector of Internal Revenue* (40 F. 2d. 564). The Collector appealed, and the Circuit Court of Appeals for the First Circuit affirmed the decision below. The reasoning of the Circuit Court of Appeals in its opinion, while differing somewhat from the argument stated above, was essentially the same, the Court holding that the reference to income in Sections 1200 and 1201 of the Act of 1924 referred to "income accruing in" the calendar year 1923. The conclusion was necessarily in favor of the taxpayer.

The Board of Tax Appeals in *Appeal of Charles Colip* (5 B. T. A., p. 123) decided against the taxpayer on a precisely similar state of facts, and the Board has followed that decision in other cases, to which it is not necessary to refer. A reading of the opinion of Mr. Sternhagen will show that no reference whatever is made to Sections 1201

(a) and (b) of the 1924 Act, which are the Sections specifically covering that case before the Board. The entire reasoning in the opinion is based upon the language of Section 1200(a), which was misconstrued in the opinion, for that section merely provides for a reduction of 25% of the amount shown as the tax upon a return for the calendar year 1923. It does not cover a case where a return, as in the cases here and in the *Maddison* and *Colip* cases, was partly for the calendar year 1923 and partly for a fiscal year including a portion of the calendar year 1923. A reduction in taxes on 1923 income shown by such returns is specifically provided for in Section 1201(b).

If separate returns of the taxpayers, one showing partnership income on a fiscal year basis and the other showing individual income on a calendar year basis, could have been filed, with a consolidated statement showing the computation of the tax on the combined income shown by the separate returns, there would have been no possible question of the right of the taxpayers to a reduction of the tax on partnership income accruing in 1923, which is expressly provided for in Section 1201(b). It is submitted that the filing of a single return showing clearly the income accruing in the different years cannot affect the taxpayers' right to the reduction.

The Circuit Court of Appeals denied relief because, as it says (R-25), "Section 1201(b) applies to a taxpayer making a return for a period beginning in 1923 and ending in 1924." "The appellants," it is said, "were not making a return for such a calendar period, but for the calendar year 1924." "By its terms Section 1201(b)," the court continues, "relates only to taxpayers reporting

income for a fiscal year different from a calendar year—*a situation not involved here*" (italics quoted). But is not that precisely the situation involved here? Manifestly each appellant's return was not for the same period as the calendar year. In each case it was a composite return, a form of return required by law. As to his ordinary income it was a return for a period identical with the calendar year. As to his partnership income it was "for a fiscal year different from the calendar year." On the face of the return it was not as a whole one for a period identical with the calendar year, for it included income attributable to a period falling partly within and partly without the calendar year. The taxpayer was in the most exact and literal sense "reporting income for a fiscal year different from a calendar year." How could the fact that he was a partner expunge this characteristic from his return? The law does not say "a taxpayer *other than a partner* reporting income for a fiscal year different from the calendar year." To uphold its ruling the court below was accordingly forced to read into the act some such words of limitation, and indeed in the very next sentence it does precisely this, for it says "Section 1201(a) (a section in structure and kind of subject matter identical with 1201(b), referring to a fiscal year 1922-3, just as Section 1201(b) refers to a fiscal year 1923-4) covers only cases where a taxpayer, *not a partner*, is reporting income," etc. On what principle of interpretation is a tax reduction, one clearly intended to be granted to all taxpayers having income attributable to broken fiscal years, denied in the case of a taxpayer where the only reason for the discrimination is that in his case the broken fis-

cal year is due to the fact that he is a partner? The broken fiscal year, the difference in the tax liability established for the two years, these are the essential elements for the application of Section 1201(b). Its application is not to be defeated by the arbitrary exclusion from its benefit of the taxpayer who happens to be a partner or because his return also includes calendar year income whose tax rate is independently provided for.

The underlying error in the reasoning of the court below is in treating Sec. 1201(b) as though it were part of a formula for making out a return. That section, the court says, (R-25) "is not applicable to a case where partnership income, and not the tax, is allocated between separate years as provided in the case of partnership of Sec. 207(b)."

On what theory does the fact that in the return the partnership income has been allocated between separate years take the case without the section defining the amount of the credit or refund? What brings it within the credit section and entitles the taxpayer to his reduction is that his return included income attributable to 1923. If there were nothing in the return but fiscal year income the return would follow the formula of Sec. 207(a); if it were a partner's return and also included individual calendar year income it would follow the formula of Sec. 207(b). The two formulae differ in that in carrying through the respective percentages of the first year and second year components of the fiscal year, one formula divides *the tax* into the same percentages or fractions, and the other formula divides the *income* and then computes the tax on each fraction. But whether the return calls for one formula or the other, it is

in each case a return showing income for a fiscal year beginning in 1923 and ending in 1924. It is the fact that he has made such a return, and has paid, or is liable to pay, a tax based thereon, that brings the taxpayer at once within the section. It brings him within it wholly irrespective of what kind of formula has been used in his return to compute the tax, or of whether in so doing he has separated the tax itself into two parts or separated the income and then computed the tax on each part. That is a mere detail in the computation of the tax; it has nothing to do with the right to the refund.

The nature of the return, its inclusion of 1923-24 fiscal year income, is thus the sole criterion in determining whether or not the taxpayer comes within the protection of the section. The section (1201-b) has to do only with defining the amount of the "*allowance by credit or refund*" to which such a taxpayer is entitled. It does not attempt to prescribe the method by which his tax itself shall be computed, nor does it limit the "credit or refund" to taxes that had been computed in any particular way. That is fully provided for elsewhere; if there be nothing but fiscal year income, Sec. 207(a) is used; if it be a partner's return including individual calendar year income, Sec. 207(b) is used. In either case the taxpayer is within the case defined in Sec. 1201(b) and entitled to his 25 per cent "credit or refund."

When it comes to determining the *amount* of the credit or refund, there is but one detail for which the return need be examined, and that detail is ascertained on mere inspection, and equally so whether the return be one made under

Sec. 207(a) or 207(b). The only thing to be ascertained from the return is the amount of income received during the fiscal year. That information furnished, there is no further use for the return and it may be disregarded.

The amount of the "tax for such period," that is, "a period beginning in 1923 and ending in 1924," is "determined under the law applicable to the calendar year 1923 and at the rates for such year." Its determination is a matter of mere arithmetical computation. This hypothetical tax determined, the next step is to fix a certain proportion of such hypothetical tax, and that proportion is defined as being the same proportion of such tax which the portion of the fiscal year falling within the calendar year 1923 is of the entire fiscal year.

Thus we arrive at a portion of a hypothetical tax for the 1923 fiscal year, an amount determined, not as the identification of any specific part of a tax paid or charged, but simply as a necessary step in a convenient method of arriving at a fair and equitable "allowance by credit or refund." Of this portion thus ascertained of a hypothetical tax we take twenty-five per cent, and it is this twenty-five per cent, an amount frankly artificial and arrived at by a purely arithmetical process, which the law takes as the allowance which the taxpayer may have "by credit or refund." That it is a fair approximation to precision is illustrated by the fact that in the present cases the amount thus reached varies but negligibly from what the credit would be if worked out by reconstructing the partners' returns according to the formula of Sec. 207(b); in Mr. Stewart's case, involving a tax of $23,732.92, the variation is less than $200; in Mr.

Shearer's case, involving a tax of $27,244.32, the variation is but a trifle over $300.

Section 1201(b) does not establish a formula for making a return, nor for computing the entire tax. Its office is quite different; to define and measure the "allowance by credit or refund" to be given every taxpayer whose return, whether made under Sec. 207(a) or 207(b), shows fiscal year income attributable partly to 1923 and partly to 1924. The error of the court below was in regarding Sec. 1201(b) as establishing a formula for making a return, wherein must be found the particular item for which the credit was to be allowed. The amount of the allowance is indeed mathematically determined from data obtained from the return, but the only necessary use of the return itself is to furnish that data, namely the amount of the fiscal year income. All the rest of the return may be disregarded; the particular formula used therein for computing the tax is wholly irrelevant.

In short, the legislative direction embodied in Sec. 1201(a) was as follows:

1. Did this taxpayer make a return showing income for a fiscal year beginning in 1923 and ending in 1924? If he did, he is entitled to an allowance by credit or refund. The amount of such allowance is determined as follows:

2. Ascertain from his return the amount of his income for the whole fiscal year beginning in 1923 and ending in 1924.

3. Compute the hypothetical tax on such income at the old 1923 rates, that is, the rates fixed by the Act of 1921.

4. Fix the portion of such hypothetical tax which is the same fraction of the tax that the portion of the fiscal year falling within 1923 is of the whole fiscal year.

5. Take twenty-five per cent of such portion.

6. Allow the taxpayer, by credit or refund, such twenty-five per cent.

Plainly, the taxpayer may take such allowance as a "credit" on the tax shown by his return filed in 1924, or if he does not take it then he may apply for it as a "refund." Section 1201(b) simply determines the amount of the allowance. The very fact that the allowance is made available as a refund shows that its determination need not parallel the structure of the return. Sec. 907(b) prescribes, in the case of a fiscal year partner, the formula for the return; Sec. 1201(b) prescribes the formula for computing the "allowance by credit or refund." The court below fell into the error of trying to find in the return some particular item which should be identical with the "allowance" directed by Sec. 1201(b), whereas the latter section has no necessary connection with the form of the return and searches only for the actual fiscal year income, which when found affords the only data required for computing the credit.

POINT II

The provisions of Section 207(b) and Section 1201(b) of the 1924 Act are not inconsistent.

As we have already pointed out, although the sole office of Sec. 1201(b) is to declare the taxpayer's right, in certain cases, to a credit or refund and to specify how its amount is to be determined, the Circuit Court of Appeals fell into the error of reading this section as though its office were to state the formula for computing the tax itself. Then on comparing this section with Sections 207(a) and 207(b), which are sections prescribing the formulae for computing the tax in two specified kinds of cases, the court observed that Sec. 1201(b) made use of one item which was employed in the formula of Sec. 207(a) for computing the tax, but was not employed in the formula of Sec. 207(b). Therefore, said the court, Sec. 1201(b) is not applicable to a case where the return was made as prescribed in Sec. 207(b). And as a partner in a firm with a fiscal year beginning in 1923 and ending in 1924, the partner also having individual income, was obliged to make his return as prescribed by Sec. 207(b), the court held that the statutory provision for allowance by credit or refund did not apply to a person making that form of return, and the petitioners were dismissed without relief.

But there is no inconsistency between Sec. 207(b) and Sec. 1201(b). One specifies how the tax is to be computed in the first instance; the other how the amount of the 25% allowance by credit or refund is to be determined. A statu-

tory provision for a refund is not obliged to reconstruct the formula for computing the tax in the first place. Suppose, for example, that Congress should for some reason desire to make some provision for partial refund of taxes paid on profits on sales of capital assets. Might it not, if it chose, provide that taxpayers whose returns during any of the preceding three years had shown such profits should be entitled "to an allowance, by credit or refund," of ten per cent of the tax on an amount equal to their three-year average of such gains, determined by the lowest rates applicable in any of those years? Here would be a formula for computing the credit or refund having no relation to the formula that had been used each year in computing the tax. But there would be no inconsistency between them. Their functions would simply be different.

So here, assuming for argument that for any reason Sec. 1201(b) is not applicable and is out of the picture, then the inquiry would be whether, without the specific provision of Sec. 1201(b) for a 25% credit, Sec. 207(b) did not itself, *in the absence of any other provision for a credit,* require an allowance of 25% of the 1923 tax. Admittedly they would not both be applicable, and even if the language of the earlier section, 207(a), might standing by itself be broad enough to provide for such a case, this would in any event be only incidental to the broader object of the section; and under familiar principles of construction it would be the later and more specific section, 1201(b), performing the particular function of prescribing how the amount of the allowance was to be determined,—it would be the later and specific section that would govern. It would not be a case of inconsistency between two sections equally applicable.

But we are assuming that Sec. 1201(b) is regarded as having no application. In such case there could of course be no inconsistency.

The Circuit Court of Appeals regarded the discrepancy between the rules for computation in these two sections as fatal to the taxpayers' contention in these cases, but even if there were doubt as to which should be applied in computing the tax reduction, there is only a small difference in the results produced by the two rules. The Circuit Court of Appeals apparently assumed that this difference was substantial, but the computation shows that the difference in tax under the rule in Section 1201(b) and the rule in Section 207(b) is less than $200 in the case of Mr. Stewart and slightly over $300 in the case of Mr. Shearer. Both rules are artificial, the purpose being to reach an approximation that would be substantially correct. Section 207(b) regards income received in one year as being income of a previous year, for its last sentence provides for placing the part of the income attributable to the earlier year in the higher brackets, using the income for the later year as if it were income of the earlier year for the purpose of ascertaining the higher bracket that applies. The method provided for in Section 1201(b) is simpler and provides for merely using proportions based upon the parts of the earlier and later years which are included in the fiscal year in question. The two methods produce results so nearly alike that the difference should not deprive a taxpayer of a reduction which it is the clear intent of the statute to grant.

However, an examination of the 1921 Act, which was in effect until January 1, 1924, and consequently applied to

the year 1923, shows that that Act contained no provisions similar to the last sentence of Section 207(b) of the Act of 1924. There had been a provision in the Revenue Act of 1918 providing for placing income of earlier years in higher brackets (Section 206) but this Section was repealed by the Act of 1921,* and the only provision in that Act in regard to fiscal years of partnerships is found in Section 205(c), which provides for broken partnership income beginning in 1920 and ending in 1921, or beginning in 1921 and ending in 1922, saying nothing about such income beginning in 1922 and ending in 1923.

Shearer *v.* Commissioner, 48 F. (2d) 522.

As the Revenue Act of 1924 in this respect affected only income for the year 1924 and later years, its new rates had no application to income for the year 1923, the tax on that income being provided for only by the Sections which granted a flat reduction of 25% on that portion of the tax imposed on income of 1923. Moreover, the rule stated in Section 1201(b) is substantially identical with the rule stated in Section 205(c) of the Act of 1918, so that it is natural to suppose that the legislative intention was to use for 1923 income a rule subsantially like the rule stated in the 1921 Act, rather than the method provided in the 1924 Act for computing tax on income accruing after January 1, 1924.

Even if there were a doubt as to which rule should apply, the fact that Section 1201(b) is a later section of the

* The repeal by omission was by inadvertence: Ways and Means Committee Report of February 11, 1924, on Revenue Bill of 1924 (H. R. 6715), page 19; Senate Finance Committee Report, page 21.

Act applying only to particular cases, while the earlier Section 207(b) applies generally to all income accruing after January 1, 1924, indicates a legislative intent that the later section should govern the particular cases involved. This situation is one in which the familiar rule applies that doubt in a taxable statute should be resolved in favor of the taxpayer.

> Gould *v.* Gould, 245 U. S. 151;
> Benziger *v.* United States, 192 U. S. 38.

The manifest purpose of Title XII of the Revenue Act of 1924 was to give every taxpayer a reduction of 25% of the tax on his income attributable to the year 1923 wherever that income was reported and whenever that income was returned. The question should not be befogged by discussion of real or supposed discrepancies in the form of the various sections of the Act involved—all such matters must yield to those of substance, and the real legislative intent should be carried out.

This Court has said:

> "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder."
> U. S. *v.* Phellis, 257 U. S. 156, 168.

Sec. 1201(b), being the section specifically devoted to the case of a taxpayer whose return showed income attributable to the years 1923 and 1924, controls.

> "As was said by Justice BREWER, in *Long* v. *Culp*, 14 Kan. 412, 414:

" 'It is also a rule of construction that, when one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto. Not because one section has more force as a legislative enactment than another, but because the legislative mind having been, in the one section, directed to this matter, must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things.' Wellsburg *v.* Panhandle T. Co. (W. Va.), 48 S. E. 746, 751."

U. S. *v.* Jackson, 143 Fed. 783, 787 (Cir. Ct. of App., 9th Cir.).

"In the consideration of irreconcilable conflicting provisions, if both were enacted at the same time, the last in order or arrangement controls. Hall *v.* Equator M. & S. Co., Fed. Cas. No. 5931; *In re* Richards, 96 Fed. 935, 939, 37 C. C. A. 634; *In re* Tune (D. C.), 115 Fed. 906, 911; United States *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41; Howard *v.* Bangor & A. R. Co., 86 Me. 387, 29 Atl. 1101; State *v.* Public Service Commission, 101 Wash. 601, 172 Pac. 890."

U. S. *v.* Daniels, 219 Fed. 844, 849 (Cir. Ct. of App., 2d Cir.).

POINT III

If Section 1201(b) is inapplicable and we look alone to Section 207(b), the rates applicable to 1923 referred to in that section are the 1921 rates less 25 per cent.

Assuming that the petitioners do not come within the terms of Sec. 1201(b), this would mean that for this particular kind of taxpayer who had paid, or was charged with, a tax on his 1923 income, no specific allowance by credit or refund had been declared. The question would then arise whether the tax imposed on him was itself fixed at a rate that in effect gave him the benefit of the 25% allowance. The presumption would be that it was so fixed, because otherwise the partner taxpayer would be left the victim of an unaccountable discrimination.

Sec. 207(b) provides that the partner whose fiscal year is different from the calendar year shall separate his partnership income into two parts in the same respective proportions as the part of the fiscal year falling within the first calendar and the part falling within the second. The tax on the first year portion (in this case the 1923 part of the fiscal year) is then computed at the rates for the calendar year 1923 "determined under the law applicable to such calendar year."

What were "the rates for the calendar year (1923) * * * determined under the law applicable to such calendar year?" Sec. 1200(a) of the Act of 1924 applied to the year 1923 rates determined as follows:

> "Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return."

The "law applicable" to 1923 was the law which in Section 1200(a) above quoted made the 1923 rates 25 per cent. less than those under the act of 1921. What other law was applicable to 1923? Every section in the act of 1924 that provided for a computation of the tax on income of 1923, whether Section 1200(a) referring to the ordinary return, Section 1201(a) referring to a return of income attributable partly to 1922 and partly to 1923, or Section 1201(b) referring to income attributable partly to 1923 and partly to 1924, declared that the tax should be a sum 25 per cent. less than the tax at the old 1921 rates; in other words, the law fixed and determined the 1923 rates at a sum equal to 75 per cent. of the old rates. What other law was "applicable thereto"?

This Court has, in effect, said that the rate of tax is the net tax burden, for in interpreting the statute permitting states to tax national bank shares provided the taxation was not "at a greater rate than is assessed upon other monied capital," this Court has considered numerous state statutes imposing taxes upon banks and has declared them void for the reason that the tax burden imposed upon the national banks was greater than that imposed upon other monied capital.

Mercantile Bank *v.* New York, 121 U. S. 138;
Merchants National Bank *v.* Richmond, 256 U. S. 635;
Iowa-Des Moines Nat. Bank *v.* Bennet, 52 Sup. Ct. Rep. 133. (Decided Dec. 14, 1931.)

The reduction of 25% in the tax on 1923 income was accomplished by Title XII of the Revenue Act of 1924, which consisted of Sections 1200 to 1206 providing for a flat reduction of 25% of the tax on 1923 income calculated under the provisions of the Act of 1921.

As is well known, this reduction was granted for the reason that the Revenue Act of 1924 did not become a law until June of that year, after 1923 returns had been filed and the first quarter of the tax shown by those returns had been paid. It was therefore impossible to make the new rates of 1924 apply to 1923 income, and to accomplish the real purpose of the Act of 1924, which was to reduce taxation for 1923 and subsequent years, the only practical way in respect to 1923 income was to give taxpayers a benefit approximately equal to the reduction in rates applicable to the tax on income of subsequent years. The new Act reduced the rates of taxation approximately 25% as compared with the old Act, and consequently the situation was met by Title XII of the Act of 1924, providing for such a flat 25% reduction. In other words, this Title XII lowered the actual tax burden for the year 1923 by 25 per cent. It is now claimed by the Internal Revenue Department that although a permanent reduction in taxes was intended, including the tax on incomes of 1923, Congress deliberately singled out individuals with fiscal year partnership income and refused them the benefit of the reduction of tax on 1923 income while it granted that reduction to all other taxpayers.

That Congress had no such discrimination in mind, but had as one of the major objects of the law an immediate

lightening of the tax burden of all persons paying taxes in respect to 1923 income, is evident from the stressing of this feature by the committee in charge. In presenting the bill in the House on February 14, 1924, Mr. Green, Chairman of the Ways and Means Committee, said:

> "There are many changes in the existing law. The first and perhaps one of the most important is the provision in relation to the taxes which are to be paid this year. The bill provides that on the taxes for the year 1923, to be paid during this calendar year of 1924, there shall be a reduction of 25 per cent.
>
> "Of course, this flat reduction of 25 per cent is not scientific, but is something that everyone can understand. Even the man who runs may read this provision and know exactly what it means. He knows that he is going to get one-fourth off of his taxes for this year. The application of it will be made in the first instance by a reduction of 25 per cent in each one of the payments to be made. * * *
>
> "It would be absolutely impossible (to give the taxpayers the new rates for their 1923 income) at this time when the bill cannot be passed until after a number of parties have already paid their taxes and already made up their returns; and to put in force the system which is provided in the bill would produce utter chaos. There is only one way of getting at it, and that is the way suggested in the bill, by making a simple, flat reduction all the way through."

Cong. Rec., Vol. 65, Part 3, p. 2427, 2432.

POINT IV

The government's contention that taxpayers with 1923-1924 fiscal year partnership income were deprived of the reduction but received a compensating equivalent by a reduction on their 1922 tax is untenable. The statute permits no such deduction.

The ruling sought by the government, that partners having fiscal year income, received in 1924 and partly attributable to 1923, are entitled to no reduction in their tax in respect to 1923, would leave such taxpayers in a class by themselves, apparently the only persons paying taxes on 1923 income to whom the law had for some unexplained reason failed to give the benefit of a tax reduction plainly intended for all. A discrimination of this kind would be an anomaly, altogether incongruous with the whole plan and purpose of an act reducing the tax burden.

But, says the government, such a partner was not left without relief. Although he was excluded from the benefit of the tax reduction granted to all other taxpayers who, like him, had paid, or been charged with, a tax on income attributable to 1923, he received as compensation a credit which no one else received; he was entitled to take a credit of 25% on his income attributable to 1922 to whatever extent that income had formed part of his partnership income for a fiscal year beginning in 1922 and ending in 1923. Indeed, the court below found in this supposed right something roughly compensatory for the discrimination against a partner which it considered the act of 1924 had wrought in respect to the 25% reduction. The court says:

> "Congress might well have thought that most partnerships were continuous during the periods covered by the remedial legislation relating to 1923 income, and that when a partner whose year for accounting ended in 1923, got a 25% deduction on earnings embracing firm income accruing in 1922, as well as down to the termination of the partnership fiscal year, in 1923, this was sufficient relief from the high tax rates prevailing in 1923."

It is submitted that the Act of 1924 reveals on the part of Congress no such rough-and-ready inexact attempt to make up for an unjust discrimination by conferring an unjust advantage. A complete answer is found in the fact that the act nowhere authorizes any such thing. No reduction was allowed by the Act of 1924 in the tax on 1922 income received as part of fiscal year income received in 1923 and reported in 1924.

That this is true is shown clearly by the provisions of Sec. 1201(a). This section provides carefully for allowing the 25% reduction only on the proportion of tax on fiscal year income which is attributable to the year 1923. Any reduction on tax on income of 1922 is denied by this section which limits the reduction to tax on 1923 income. Yet, in spite of the plain provisions of this section the opinion of the court below bases its argument on the incorrect assumption that the reduction is granted by the Act in the tax payable in 1924, on 1922 income, reported with income for 1923.

Sec. 1201(a) by expressly providing that when 1922 income is reported with 1923 income, the tax on 1923 income only shall be reduced provided in effect that no reduction should be allowed in the tax on 1922 income, wherever reported.

This clear statutory provision was disregarded by the Circuit Court of Appeals in its opinion which, in consequence, proceeded upon the incorrect assumption that the tax on 1922 income reported in 1923 returns, and consequently payable in 1924, was reduced 25% by the Act of 1924.

Even if the law permitted such an allowance, it would be of no benefit except to taxpayers whose partnerships were continuous for 1922 and 1923, a purely arbitrary classification. Such cases as *Rogers* v. *Anderson* and *Woody* v. *Bowers*, now pending in the courts below (Point I(a), *ad fin.*), in which the partnership began business in 1923, show that the supposed compensation in the form of special preferential treatment in respect to the tax on income of 1922, even could anything of the sort be found in the law, would be illuscry because wholly fortuitous in its application.

POINT V

To refuse the reduction in taxes on 1923 partnership income reported in 1924 returns would violate the Fifth Amendment to the Constitution of the United States.

This contention was passed over lightly by the Circuit Court of Appeals, the opinion stating, "there may be individual hardships and a firm which did not exist in 1922 and began business in 1923 would be unable to obtain any refund under the remedial provisions of the Act of 1924, but all

taxpayers similarly situated are treated alike". (R-28). This statement shows that the Court regarded individuals and firms as separate taxpayers. There never has been in any Revenue Act any income tax upon a firm. The only taxpayers are individual members of partnerships. All income tax acts have provided that partners are liable for income tax only in their individual capacity. It must follow that all taxpayers similarly situated are not treated alike if the Circuit Court of Appeals in these cases is correct. A taxpayer having 1923 income from one source would receive a reduction while another taxpayer having equally taxable income from another source would receive no reduction. In both cases the income is the same. It is the individual income of the taxpayer, in one case derived from a partnership and in another case derived from any other source but a partnership. Partnership income from tax exempt securities, from dividends, and from other sources is treated as the individual income of the partners from those sources. There is no distinction possible except that in one case the income is derived through a joint effort with others and in the other case the income is purely personal. This class does not constitute a small or inconsiderable number of taxpayers. It is well known that many partnerships commenced at dates other than January first. In fact, because this is usually the case and because partnerships usually have fiscal years differing from calendar years, provisions have been made in every income tax act for computing the taxes on partnership income where the partnership keeps accounting on a fiscal year basis. The Circuit Court of Appeals concedes that under its decision no member of a partnership beginning business after January 1, 1923, would

receive any reduction of 1923 income taxes on partnership income,—for example, if a partnership started business on February 1, 1923, and made large earnings during that year, no member of that firm would have any reduction in the taxes on that income, but would be obliged to pay full taxes computed under the 1921 Act; and these taxes would be computed at rates which were not the rates for 1923, but at rates for earlier years, the tax for 1923 being 25% less.*

Besides this class of partners who would receive no reduction whatever on partnership income earned in 1923, the discrimination would also affect all other partners having 1923 partnership income. As has been pointed out above (Point IV), the tax reduction did not affect 1922 income, as is clearly shown by the provisions of Section 1201(a) of the Revenue Act of 1924. Consequently, a taxpayer having any income from a firm which was in existence prior to January 1, 1923, is in no different position from that of a member of a firm which commenced business after January 1, 1923. He is not entitled to a reduction on 1922 income, and the decision below in these cases deprives him of any reduction in 1923 partnership income. The discrimination and hardship of this construction is apparent from the fact, easily computed from the record, that Mr. Stewart had no taxable personal non-partnership income for the year 1924, as his deductions exceeded his personal income, other than that derived from the firm of which he was a member, by more than $15,000, while Mr. Shearer's net income from per-

* We are advised that in *Rogers* v. *Anderson* and *Woody* v. *Bowers*, now pending in the District Court for the Southern District of New York, above referred to (Point I (a), *ad fin.*), the taxpayers' firm was formed in ~~1893~~ 1923.

sonal sources for 1924 was only $2,567.63, the partnership income in each case for the fiscal year beginning May 1, 1923, having amounted to over $100,000. A mere statement of the situation is sufficient to show the arbitrary nature of such a classification. Such an Act, although a seeming exercise of the taxing power, would be "so arbitrary as to constrain to the conclusion that it was not the exercise of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such gross and patent inequality as to inevitably lead to the same conclusion."

Brushaber *v.* Union Pacific R. R., 240 U. S. 1, 24.
Barclay & Co. *v.* Edwards, 267 U. S. 442, 450.

The judgments of the Circuit Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

CHARLES HENRY BUTLER,
Counsel for Petitioners.

GEORGE L. SHEARER,
M'CREADY SYKES,
Of Counsel.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924

(Effective as of January 1, 1924)

FISCAL YEARS

Sec. 207. (a) If the taxpayer makes return for a period beginning in one calendar year (hereinafter in this subdivision called "first calendar year") and ending in the following calendar year (hereinafter in this sbduivision called "second calendar year") and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then his tax under this title for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a tax for the entire period, determined under the law applicable to the first calendar year and at the rates for such year, which the portion of such period falling within the first calendar year is of the entire period; and (2) the same proportion of a tax for the entire period, determined under the law applicable to the second calendar year and at the rates for such year, which the portion of such period falling within the second calendar year is of the entire period.

(b) If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within

such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year.

PARTNERSHIPS

Sec. 218. (a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

PARTNERSHIP RETURNS

Sec. 224. Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income

if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

TITLE XII.—REDUCTION OF INCOME TAX PAYABLE IN 1924

SEC. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

SEC. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

(c) In the case of a deficiency assessed upon a taxpayer entitled to the benefits of subdivision (a) or (b) in respect of the tax for a period beginning in 1922 and ending in 1923 or beginning in 1923 and ending in 1924, the allowance provided for in subdivisions (a) and (b) shall be made in respect of such deficiency in a similar manner to that provided in subdivision (f) of section 1200.

Revenue Act of 1921

Sec. 205 (c). If a fiscal year of a partnership begins in 1920 and ends in 1921, or begins in 1921 and ends in 1922, then (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

[Repealed by Act of 1924]

Revenue Act of 1918

Sec. 206. That whenever parts of a taxpayer's income are subject to rates for different calendar years, the part subject to the rates for the most recent calendar year shall be placed in the lower brackets of the rate schedule provided in this title, the part subject to the rates for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to that year, and so on until the entire net income has been accounted for. In determining the income, any deductions, exemptions or credits of a kind not plainly and properly chargeable against the income taxable at rates for a preceding year shall first be applied against the income subject to rates for the most recent calendar year; but any balance thereof shall be applied against the income subject to the rates of the next preceding year or years until fully allowed.

[Repealed by Act of 1921]

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CHARLES ELMORE

Nos. 469 and 470

In the Supreme Court of the United States

OCTOBER TERM, 1931

GEORGE L. SHEARER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

WILLIAM A. W. STEWART, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 469

GEORGE L. SHEARER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

No. 470

WILLIAM A. W. STEWART, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose these petitions.

OPINIONS BELOW

These cases were consolidated for hearing before the Board of Tax Appeals and disposed of in one

opinion (No. 469, R. 17–20; No. 470, R. 18–21) which is reported in 18 B. T. A. 393. The Circuit Court of Appeals also heard the cases together and rendered one opinion (No. 469, R. 34–41; No. 470, R. 36–43), 52 F. (2d) 17.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1931. (R. 41–42.) The petition for a writ of certiorari in each of said cases was filed October 19, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioners in 1925 filed their individual returns for the calendar year 1924 and reported thereon their shares of the income from a partnership having a fiscal year ending April 30, 1924. Were they entitled under the provisions of Title XII of the Revenue Act of 1924 to receive a reduction of 25 per centum of the tax on that portion of such partnership income which was taxable at 1923 rates under Section 207 (b) of the Revenue Act of 1924?

STATUTE INVOLVED

The statutes involved are set forth in the appendix, pp. 6–8, *infra*.

STATEMENT

The record references herein made are to No. 469, and as the facts in each of the cases are conceded with the exception of the amounts involved no reference will be made to No. 470. The facts may be summarized as follows (R. 18–19):

The petitioners made and filed their individual income-tax returns on the basis of the calendar year 1924. The partnership of Stewart & Shearer, whose members are the petitioners herein, made and filed a partnership return of income on the basis of a fiscal year ended April 30, 1924. The Commissioner determined the net income of petitioner Shearer for the calendar year 1924 to be $103,613.53, of which amount $67,462.38 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924 was $3,071.67 and that the tax on the income attributable to 1923 was $27,244.32. The Commissioner determined the net income of petitioner Stewart for the calendar year 1924 to be $91,165.35, of which amount $71,462.39 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924 was $688.43 and that the tax on the income attributable to 1923 was $23,732.92.

Each of the petitioners has contended throughout that he was entitled to receive a reduction of 25 per centum of the tax on that portion of the partnership income attributable to the year 1923. This contention was rejected by the Commissioner, and his determination was sustained by the Board of Tax Appeals and by the Circuit Court of Appeals.

DISCUSSION

We submit that the decisions below were correct. For present purposes it seems sufficient to refer merely to the opinion of the Circuit Court of Appeals in the instant case (R. 35–41) and to the opinion in the *Appeal of Colip,* 5 B. T. A. 123, which decided the question in accordance with the Commissioner's determination and has been uniformly followed by the Board of Tax Appeals in numerous cases.

The point involved appears to be of little importance. It seems improbable that in the case of any taxpayer any large amount will turn upon it, and it applies to only one year and affects only taxpayers reporting for the calendar year 1924 who received income as members of a partnership having a fiscal year other than the calendar year ending in 1924. It is impossible to ascertain whether many cases are pending involving this point. The only such cases pending before any court, of which we are aware, are *Shannon & Luchs* v. *Commissioner* in the Court of Appeals of the District of

Columbia and *Westfeld* v. *Commissioner* in the Circuit Court of Appeals for the Fifth Circuit.

The decision below is, however, directly in conflict with that of the Circuit Court of Appeals for the First Circuit in *White* v. *Maddison,* 45 F. (2d) 335, and because of that fact and the pendency of the cases above mentioned we are not inclined to oppose the granting of the writ, although we do not urge it.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
NORMAN D. KELLER,
F. EDWARD MITCHELL,
Special Assistants to the Attorney General.

NOVEMBER, 1931.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253, 262, 275, 352, 353, 354:

SEC. 218. (a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed. (U. S. C., Title 26, Sec. 959.)

SEC. 207. (b) If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full

fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year. (U. S. C., Title 26, Sec. 938.)

SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

Title II (called "Income Tax") as of January 1, 1924; * * *.

TITLE XII.—REDUCTION OF INCOME TAX PAYABLE IN 1924

SEC. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

SEC. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and end-

ing in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

U. S. GOVERNMENT PRINTING OFFICE: 1931

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Nos. 468 and 470

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM A. W. STEWART, PETITIONER,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

WILLIAM A. W. STEWART, PETITIONER,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 469

GEORGE L. SHEARER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

No. 470

WILLIAM A. W. STEWART, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

These cases were consolidated for hearing before the Board of Tax Appeals and were disposed of in one opinion (No. 469, R. 10–12; No. 470, 10–12), which is reported in 18 B. T. A. 393. The cases

were heard together by the Circuit Court of Appeals, which also rendered but one opinion (No. 469, R. 21–28; No. 470, R. 21–28) reported in 52 F. (2d) 17.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered July 24, 1931. (No. 469, R. 28–29; No. 470, R. 28–29.) Petitions for certiorari were filed October 19, 1931, and were granted November 30, 1931. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioners in 1925 filed their individual returns for the calendar year 1924 and reported thereon their distributive shares of the income from a partnership having a fiscal year ending April 30, 1924. Were they entitled by the provisions of Title XII of the Revenue Act of 1924 to receive a reduction of 25 per centum of the tax on that portion of their shares of partnership income which was taxable at 1923 rates under Section 207 (b) of the Revenue Act of 1924?

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 261, 275, 352, 353, 354:

> SEC. 218. (a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

SEC. 207. (a) If the taxpayer makes return for a period beginning in one calendar year (hereinafter in this subdivision called "first calendar year") and ending in the following calendar year (hereinafter in this subdivision called "second calendar year") and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then his tax under this title for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a tax for the entire period, determined under the law applicable to the first calendar year and at the rates for such year, which the portion of such period falling within the first calendar year is of the entire period; and (2) the same proportion of a tax for the entire period, determined under the law applicable to the second calendar year and at the rates for such year, which the portion of such

period falling within the second calendar year is of the entire period.

(b) If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiseal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year.

SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

Title II (called "Income Tax") as of January 1, 1924.

* * * * *

TITLE XII.—REDUCTION OF INCOME TAX PAYABLE IN 1924

SEC. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

SEC. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an

allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

STATEMENT

The facts in each case are the same with the exception of the amounts involved. They may be summarized as follows (No. 469, R. 10–11):

The petitioners made and filed their individual income-tax returns for the calendar year 1924. The partnership of Stewart & Shearer, whose members are the petitioners herein, made and filed a partnership return of income for the fiscal year ended April 30, 1924. The Commissioner determined the net income of petitioner Shearer for the calendar year 1924 to be $103,613.53, of which amount $67,462.38 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924 was $3,071.67 and that the tax on the income attributable to 1923 was $27,-244.32. The Commissioner determined the net income of petitioner Stewart for the calendar year 1924 to be $91,165.35, of which amount $71,462.39 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable

to 1924 was $688.43 and that the tax on the income attributable to 1923 was $23,732.92.

Each petitioner claimed the right to receive a reduction of 25% of his tax on that portion of the partnership income shown on his individual returns for the calendar year 1924, which was attributable to the year 1923. The claims were rejected by the Commissioner and his determination was sustained by the Board of Tax Appeals, which followed its earlier decisions beginning with *Appeal of Charles Colip*, 5 B. T. A. 123 (No. 469, R. 10–12; No. 470, R. 10–12), and by the Circuit Court of Appeals on review of the Board's decision (No. 469, R. 21–28; No. 470, R. 21–28).

SUMMARY OF ARGUMENT

Title XII of the Revenue Act of 1924 contains a comprehensive scheme for relieving all taxpayers, other than corporations, from a portion of taxes assessed upon income for 1923. Congress determined to allow a credit or refund of 25% to such taxpayers instead of reducing the rates applicable to 1923 income, because the Revenue Act of 1924 could not take effect in time to permit effective relief by reduction in rates. Congress used the taxpayers' basis of return as the determining factor in allowing the credit, and did not, in the case of calendar-year returns, base the credit upon the source of partnership income.

Section 1200 (a) of the Revenue Act of 1924 gave a 25% credit to taxpayers making returns

for the calendar year 1923, and Sections 1201 (a) and 1201 (b) gave a similar credit to taxpayers making returns on a fiscal-year basis. The petitioners were entitled to a credit upon their returns for 1923, and presumably claimed and received the full credit which Congress intended to extend to taxpayers in their situation. They now seek an additional credit, and their contention that they should have it is contrary to the Congressional purpose and the plain terms of the statute. An examination of the terms of the statute shows that no provision was made for taxpayers making return for the calendar year 1924, and petitioners can not receive the credit they claim.

The decision of the court below follows a long line of decisions of the Board of Tax Appeals, and a contrary decision by the Circuit Court of Appeals for the First Circuit, based upon a judicial revision of the terms of the statute, is clearly wrong.

There is no basis for a claim that the statute, as construed by the court below, is in violation of the Fifth Amendment.

ARGUMENT

Both of the petitioners made their returns on the calendar year basis for the year 1924 and were members of a partnership having a fiscal year ending April 30, 1924. Having elected to make their individual returns on the basis of the calendar year 1924 instead of on the same fiscal year basis as the partnership, they were required by Section 218 (a)

of the Revenue Act of 1924, *supra,* to report as income for the calendar year 1924 their proportionate shares of the partnership profits whether distributed or not for the whole of the fiscal year of the partnership ending within their taxable year. Under the statute such amounts constituted a part of each petitioner's taxable income for the calendar year 1924, although the partnership income was earned over a period embracing parts of two calendar years. The petitioners, accordingly, included in their returns their shares of partnership income for the partnership fiscal year running from May 1, 1923, to April 30, 1924.

The amount of tax to be paid by each petitioner for the calendar year 1924 is computed under Section 207 (b) of the Revenue Act of 1924, *supra.* The portion of the partnership income allocable to each year is found by taking the fractional part of the actual income of the partnership for its fiscal year equal to the proportion which the number of months in each year bears to twelve, the total number of months in the fiscal year. In computing each petitioner's normal tax the partnership income allocable to 1924 is subject to the rates of the Revenue Act of 1924 and that allocable to 1923 is subject to the rates of the Revenue Act of 1921. In computing the surtax the partnership income allocable to 1924, together with any individual income for the year, is placed in the lower brackets of the rate schedule applicable to the calendar year 1924, and the partnership income allocable to the year 1923 is placed

in the next higher brackets of the rate schedule applicable to the year 1923, contained in the Revenue Act of 1921.

Since the normal and surtax rates of the 1921 Act were somewhat higher than those of the 1924 Act, the computation results in a higher tax than that which would be payable at straight 1924 rates. The fact that under Section 207 (b) the petitioners' taxes are computed by reference to the rates of the two calendar years does not make the whole of the income from the partnership any the less income received or derived during the calendar year 1924. The tax resulting from the computation is the tax upon income for the calendar year 1924. The income is all that of the later year although the statute recognizes the source of part of the income in the earlier year in fixing the rates to be applied where they differ in the two years. Each petitioner's share is treated as an entirety received in a particular calendar year. Cf. *Shearer* v. *Commissioner*, 48 F. (2d) 552 (C. C. A. 2d).

In assessing the tax due from each of the petitioners under his return for the calendar year 1924 the Commissioner followed the method of computation which we have outlined and assessed a tax against each petitioner for the calendar year 1924. Petitioners sought a redetermination of their taxes because they contended that under the provisions of Title XII of the Revenue Act of 1924 they were entitled to a refund or credit of 25% of the tax which was based upon partnership income al-

located to the 1923 portion of the partnership's fiscal year.

Both the Board of Tax Appeals and the court below held that petitioners were not entitled to the credit or refund which they claim. We believe that the result reached was correct and that it was clearly required by the plain language of the statute.

THE PETITIONERS WERE NOT ENTITLED TO A DEDUCTION OF 25% OF ANY PART OF THE INCOME INCLUDED IN THEIR RETURN FOR THE CALENDAR YEAR 1924

Title XII of the Revenue Act of 1924 provides a comprehensive scheme for returning to taxpayers, other than corporations, 25% of the taxes paid or payable on taxable income for the year 1923. When these provisions were under consideration in Congress it appeared that the condition of the Treasury was such that the full payment of income taxes on taxable income for the year 1923 would not be required for the support of the Government.[1] It was realized, however, that before the Revenue Act of 1924 could be passed, returns for the year 1923 would be filed, and in many cases the taxes paid, at the rates provided in the prior Act of 1921. The purpose was to reduce these taxes by allowing the credits or refunds of 25% as provided in Sections 1200 (a), 1201 (a), and 1201 (b).

While the scheme of the statute, as set forth in these sections, was characterized in the debates

[1] The problem confronting Congress is fully disclosed by the legislative history, which we have summarized in the Appendix, *infra*.

as unscientific, it was considered as a rough-and-ready method of granting the desired relief. By giving credit against the taxes assessed at rates regarded as too high, instead of revising the rates, Congress adopted a practical solution of convenient and easy application. It dealt with the problem on the basis of the taxpayer's return, and in Section 1200 (a) provided for a 25% credit to taxpayers making returns for the calendar year 1923; and then, in Sections 1201 (a) and 1201 (b) it granted a similar credit to taxpayers making their returns upon a fiscal-year basis. In none of these clauses of the Act did it provide for any credit to taxpayers making returns for the calendar year 1924. Obviously there was to be but one deduction of 25% in the case of taxpayers making their returns upon a calendar-year basis, which is fully and completely covered by Section 1200 (a).

The scheme thus adopted was not only inclusive of all taxpayers except corporations but was necessarily exclusive of all deductions other than those specifically provided for in these three sections. The petitioners were obviously entitled to a deduction under Section 1200 (a), and presumably claimed a credit against the tax assessed upon their return for the calendar year 1923. They were not entitled to a credit under Section 1201 (a) or Section 1201 (b), because these sections are in terms applicable only to taxpayers making returns for fiscal years ending and beginning in 1923, upon the proportionate basis provided in these sections.

Keeping in mind the very simple and definite plan embodied in the statute, and the purpose which Congress had in view, it is quite impossible to sustain the contention that the petitioners, entitled as they were to a deduction of 25% of their taxes paid for the year 1923, are entitled to a further deduction of 25% of the taxes upon income returned for the calendar year 1924, which was partnership income attributable under Section 207 (b) to the year 1923. Section 207 (b) has no application to the credit provisions of Sections 1200 and 1201. It merely provides the method of applying the tax rates prevailing in different years to partnership income when the income of the partnership is determined upon a fiscal-year basis. Logically, it may be said, Congress might have provided for such a credit as the petitioners claim. But it did not do so. Choosing to base the credit allowance upon the taxpayer's return, it did not follow consistently the source of the income or the rate at which it was taxed, as a guide to the allowance of the credit.

Thus, a partner who made return of his taxable income for 1923 upon a calendar-year basis, and included therein partnership income determined upon a fiscal-year basis, would under Section 1200 (a) be entitled to a credit applied to income attributable under Section 207 (b) to the year 1922. (I. T. 2146, Cumulative Bulletin IV–1, January–June, 1925, p. 88.) It can not reasonably be contended that Congress intended to allow one who

was entitled to such a deduction to claim a further reduction upon income of the partnership returned for the calendar year 1924, and attributable under Section 207 (b) to the year 1923. Such contentions are destructive of the very scheme and plan definitely and clearly set forth in Title XII of the Act of 1924 for the allowance of credits and refunds. This is made abundantly clear by the language of Sections 1200 (a), 1201 (a), and 1201 (b).

Section 1200 (a) provides:

> SEC. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

It is apparent that this provision does not cover petitioners, for it relates only to taxpayers making returns for the calendar year 1923. The petitioners' returns were for the calendar year 1924. Moreover, this section applies only to taxes imposed by Parts I and II of Title II of the Revenue Act of 1921. The Act of 1921 does not impose the taxes which the petitioners were required to pay for the calendar year 1924. Such taxes are imposed by the Revenue Act of 1924, and that Act alone, Title II of the Revenue Act of 1921 having been repealed as of January 1, 1924, by Section 1100 (a) of the Revenue Act of 1924, *supra*. The rates provided by the

Revenue Act of 1921 are made applicable to the portion of partnership income attributed to the part of the partnership fiscal year which elapsed in 1923 solely because of the provisions of 207 (b) of the Revenue Act of 1924. They did not resurrect the Revenue Act of 1921, but merely served to adopt the applicable schedule of tax rates in the repealed statute.

Section 1201 (a) of the Revenue Act of 1924 is clearly inapplicable to petitioners, because that provision is in terms limited to taxpayers making a return for a period beginning in 1922 and ending in 1923. Petitioners' returns were for the calendar year 1924, and this section is therefore not applicable to such returns.

Petitioners' principal contention is that Section 1201 (b) is applicable to their returns, and, therefore, that they should be allowed the credit therein provided. Section 1201 (b) is as follows:

> (b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

It is apparent that Section 1201 (b) likewise does not apply to the petitioners. This section is by

its terms limited to taxpayers making returns for a period beginning in 1923 and ending in 1924—that is to say, upon a fiscal-year basis. Its language can have no application to a taxpayer making return, for a calendar year, of income derived from a partnership, whether a portion of such income is attributable under Section 207 (b) to 1923 or not. This is the plain meaning of the language used. But the intent of Congress is further demonstrated by the fact that when the credit allowed under Section 1201 (b) is computed upon a taxpayer's fiscal-year return it will always equal exactly 25% of the tax attributable to 1923, since the credit under Section 1201 (b) is computed in exactly the same manner as the tax is computed under Section 207 (a) of the 1924 Act. But if attempt is made to apply the provisions of this section to a taxpayer making return for a calendar year, which includes partnership income determined upon a fiscal-year basis, the credit, as computed under Section 1201 (b) will not, except by chance, equal 25% of the tax paid under such return on the 1923 portion of partnership income, since the credit computed under 1201 (b) and the tax computed under 207 (b) are computed by entirely different methods. This phase of the problem is treated by the court below in its opinion. (R. 39–40.) Such results are incongruous and quite inconsistent with the simple scheme embodied in Sections 1200 (a), 1201 (a), and 1201 (b) and lead necessarily to the conclusion

that only confusion results from departing from the plain language of these sections.

It should also be noted that if 1200 (a) applies to this case, as we contend, these petitioners were entitled to take the deduction provided for in that section on their taxes for the calendar year 1923, and if their contentions now advanced are sustained, they will receive a deduction upon income attributable to partnership business during a period of twenty months. This is quite inconsistent with the plain intent of the statute, to allow only a credit against taxes assessed for a single year's income.

We find no escape from the conclusion that the petitioners' contentions in this case are inconsistent with the structure and purpose of the statute, and in contradiction of its express language.

The decision of the Board of Tax Appeals in this case follows a long line of decisions of the Board[2] holding that the credit and refund provisions of

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[2] See *Appeal of C. A. Weaver*, 5 B. T. A. 313; *Hoke* v. *Commissioner*, 5 B. T. A. 1247; *Morf* v. *Commissioner*, 6 B. T. A. 309; *McJunkin* v. *Commissioner*, 6 B. T. A. 425; *Behrends* v. *Commissioner*, 6 B. T. A. 524; *Schwartz* v. *Commissioner*, 7 B. T. A. 223; *Griesheimer* v. *Commissioner*, 7 B. T. A. 1225; *Steefel* v. *Commissioner*, 8 B. T. A. 1111; *McFetridge* v. *Commissioner*, 9 B. T. A. 759; *Gibb* v. *Commissioner*, 10 B. T. A. 1373; *Murphy* v. *Commissioner*, 12 B. T. A. 142; *Tighe* v. *Commissioner*, 12 B. T. A. 670; *McDowell* v. *Commissioner*, 16 B. T. A. 95; *Herdling* v. *Commissioner*, 16 B. T. A. 100; *Shannon* v. *Commissioner*, 19 B. T. A. 640, now on appeal (D. C. App.); *Westfeldt* v. *Commissioner*, 19 B. T. A. 1298, now on appeal (C. C. A. 5th).

the 1924 Act are not applicable to taxpayers making returns upon the basis of the calendar year 1924, and including income from partnerships having a fiscal year covering parts of the years 1923 and 1924. These decisions follow a well-reasoned opinion of the Board in *Appeal of Charles Colip,* 5 B. T. A. 123, which was specifically accepted by the court below.

The court below refused to follow the decision of the Circuit Court of Appeals for the First Circuit in *White* v. *Maddison,* 45 F. (2d) 335, where a different conclusion was reached. The District Court in that case had held that a return similar to petitioners' could be treated as a return for the calendar year 1923, and so receive the benefit of the credit provisions of Section 1200 (a) of the 1924 Act. The Circuit Court of Appeals reached the same conclusion for different reasons. In order to construe the statute as permitting the credit to the taxpayer involved, that court found it necessary to interpolate certain words which entirely changed the meaning of each of the sections in Title XII authorizing credit.

We believe that this departure from the plain language of the statute and this decision, based upon the statute as rewritten by the court, was clearly erroneous, for the court was not free to modify the plain terms of the statute under the guise of construction. *Crooks* v. *Harrelson,* 282 U. S. 55, 60–61.

Even if the statute had read as the court in *White* v. *Maddison, supra,* treated it as reading, the petitioners would not be entitled to the credit claimed. The court read into Section 1200 (a) and Section 1201 (a) and (b) the words "income accruing in," after the words "any taxpayer making returns, for." Income is not always returned for taxation in the year in which it is accrued. The petitioners in this case may have made returns on a cash disbursements and receipts basis, and it would then be immaterial how much income accrued in any particular year. While the income may have been earned by the partnership partly during 1923, under the provisions of Section 218 (a) of the 1924 Act, the petitioners, as individuals, are required to report such income as an entirety in the calendar year 1924 (unless they elect, with the approval of the Commissioner, to adopt the same fiscal year as the partnership, which they did not do here), and it is then that such income accrued to them for purposes of taxation. Section 1200 (a) clearly applies only to those taxpayers who made returns for the calendar year 1923, and the time when the income was earned by the partnership can not affect the application of the statute.

The petitioners contend that if the statute is so construed as to deny them a credit or refund, the provisions for credit or refund violate the Fifth Amendment. But the credit provisions do not levy a tax and deal only with taxes already paid or as-

sessed. They do not take from the petitioners any property. The petitioners, presumably, have already received the benefit of the credit upon their returns for 1923 and no constitutional provision requires that they should have more.

There is no basis for a contention that the statute contains an unreasonable distinction or discrimination, or that it is arbitrary or capricious. *Cf. Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24. All taxpayers similarly situated are treated alike. All individuals receive the benefit of tax reductions. The taxpayers on a calendar year basis, making return for the year 1923 (even though their returns include income of a partnership having a fiscal year extending from part of 1922 to 1923) receive the credit under Section 1200 (a), and taxpayers on a fiscal year basis receive that benefit under Section 1201 (a) or (b). The statute, as construed by the court below, has geographical uniformity, is reasonable in its operation, and the Fifth Amendment can not apply. *Billings* v. *United States,* 232 U. S. 261, 282; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450; *Cooper* v. *United States,* 280 U. S. 409.

The petitioners argue that the statute, as construed by the court below, may be unconstitutional because there may be other taxpayers receiving income from partnerships formed after January 1, 1923, who could not receive the benefit of the credit under Section 1200 (a). It seems entirely clear,

that even as to such taxpayers, the statute would be valid, and in any event the petitioners do not appear to have been deprived of the benefits of Section 1200 (a) as applied to their returns for the calendar year 1923, and not being within the class on whose account they express this concern, they can not complain of the alleged failure to give relief to such class. See *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Yazoo & Mississippi R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219; *Hatch* v. *Reardon*, 204 U. S. 152, 160.

CONCLUSION

The decision of the court below was correct and should be affirmed.

Respectfully submitted.

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FEBRUARY, 1932.

APPENDIX

At the time the Revenue Act of 1924 was under consideration there was a surplus in the Treasury and there was, therefore, no need for the continuation of the high rates of the 1921 Act. Cf. H. R. 179, 68th Cong., 1st Sess., p. 1. Since it was believed that by the time the bill would become law returns for the year 1923 would have been filed and in many cases the taxes would have been paid, it was decided to remit 25 per cent of the taxes for that year and to lower the rates for subsequent years. This purpose was explained on the floor of the House by Representative Green, Chairman of the Committee on Ways and Means, as follows (Cong. Rec., Vol. 65, Part 3, pp. 2427–2428):

> The bill provides that on the taxes for the year 1923, to be paid during this calendar year of 1924, there shall be a reduction of 25 per cent.
>
> Of course, this flat reduction of 25 per cent is not scientific, but it is something that everyone can understand. Even the man who runs may read this provision and know exactly what it means. He knows he is going to get one-fourth off of his taxes for this year. The application of it will be made in the first instance by a reduction of 25 per cent in each one of the payments to be made. However, it is perfectly plain at this time that the bill will not be passed until after the first payment is due this year,

and perhaps not until after the second payment is due.

In answer to the question why the same rates should not be adopted for 1923 as those proposed for 1924, the Chairman stated (Cong. Rec., Vol. 65, Part 3, p. 2432):

> It would be absolutely impossible at this time when the bill can not be passed until after a number of parties have already paid their taxes and already made up their returns; and to put in force the system which is provided in the bill would produce utter chaos. There is only one way of getting at it, and that is the way suggested in the bill, by making a simple, flat reduction all the way through.

The Committee Reports of the House and Senate with reference to the credit are in identical language. They state in part (H. R. 179, 68th Cong., 1st Sess., p. 2; S. R. 398, 68th Cong., 1st Sess., p. 2):

> The bill provides for two forms of tax reduction:
>
> (1) Temporary and immediate relief to taxpayers by a 25 per cent reduction of the income tax payable in the year 1924 on 1923 taxable income. The estimated reduction resulting from this provision is as follows:

Fiscal year 1924	$128,010,000
Fiscal year 1925	104,740,000
Total reduction	232,750,000

> (2) Permanent relief by the revision of the revenue act of 1921 through the reduction of certain taxes and the repeal of others. * * *

The Senate Finance Committee Report also contains the following (S. R. 398, 68th Cong., 1st Sess., p. 48):

REDUCTION OF INCOME TAXES PAYABLE IN 1924

In accordance with the general scheme of tax reduction, Title XIII provides immediate relief for the taxpayers by allowing a 25 per cent reduction of the income tax payable in 1924 on 1923 taxable income.

U. S. GOVERNMENT PRINTING OFFICE, 1938

FILE COPY

FEB 19

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931

Nos. 469-470

GEORGE L. SHEARER,
Petitioner,

vs.

DAVID BURNET,
Commissioner of Internal Revenue,
Respondent,

and

WILLIAM A. W. STEWART,
Petitioner,

vs.

DAVID BURNET,
Commissioner of Internal Revenue,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICI CURIAE

BURTON E. EAMES

R. GAYNOR WELLINGS

Amici Curiae

Supreme Court of the United States

OCTOBER TERM, 1931

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Commissioner of Internal Revenue,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Now come Burton E. Eames and R. Gaynor Wellings, counsel for George L. DeBlois in an action brought by him against one Thomas W. White, Collector of Internal Revenue, which action is now pending in the United States District Court for the District of Massachusetts

(Law No. 4636), who were also counsel for Arthur N. Maddison in an action brought by him against said Thomas W. White, Collector of Internal Revenue, which action was decided by the United States District Court for the District of Massachusetts in favor of the plaintiff (40 Fed. (2d) 564), and on appeal by said Collector to the United States Circuit Court of Appeals for the First Circuit, was affirmed (45 Fed. (2d) 335), and say that the issue in said cases is the same as that presented for determination by the cases now before this Court and move for leave to file this brief and to argue orally as amici curiae in the cases now at Bar.

Respectfully submitted,

BURTON E. EAMES
R. GAYNOR WELLINGS

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Commissioner of Internal Revenue,
Respondent.

BRIEF OF AMICI CURIAE.

These cases are before this Court upon writs of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit.

This brief is filed by Burton E. Eames and R. Gaynor Wellings, counsel for George L. DeBlois, in an action brought by him against one Thomas W. White, Collector

of Internal Revenue, which action is now pending in the United States District Court for the District of Massachusetts (Law No. 4636), who were also counsel for Arthur N. Maddison in an action brought by him against said Thomas W. White, Collector of Internal Revenue, which action was decided by the United States District Court for the District of Massachusetts in favor of the plaintiff (40 Fed. (2d) 564), and on appeal by said Collector to the United States Circuit Court of Appeals for the First Circuit, was affirmed (45 Fed. (2d) 335). The issue in said cases is the same as that presented for determination by the cases now before this Court and this brief is submitted on the basis of the facts presented by the cases now at Bar.

INTRODUCTORY STATEMENT.

These cases originated by way of petitions filed in the United States Board of Tax Appeals by George L. Shearer and William A. W. Stewart to procure a redetermination of a deficiency in their income taxes for the calendar year 1924 which had been assessed by the Commissioner of Internal Revenue.

The cases were heard by the United States Board of Tax Appeals upon an agreed statement of facts. The Board found in favor of the Commissioner of Internal Revenue in both cases and decided a deficiency existed for the year 1924 (18 B. T. A. 393). An appeal was taken by the petitioner in each case from the decision of the United States Board of Tax Appeals to the United States Circuit Court of Appeals for the Second Circuit.

The United States Circuit Court of Appeals for the Second Circuit affirmed the decision of the Board of Tax

Appeals (52 Fed. (2d) 17), and the petitioners in each case filed a petition in this Court for a writ of certiorari for a review of said decisions, said petitions being granted by this Court November 30, 1931.

The question involved in these cases is whether the 25% reduction prescribed by Sections 1200 and 1201 of the Revenue Act of 1924 applies to that portion of the petitioners' partnership income for the partnership fiscal year ended April 30, 1924, which accrued in the calendar year 1923 and which was required under the provisions of the law to be reported by the petitioners in their respective returns for the calendar year 1924.

The petitioners here contend that the decision of the United States Board of Tax Appeals and the Circuit Court of Appeals for the Second Circuit was wrong and that they are entitled to a deduction of 25% upon their income taxes computed upon the basis of their respective returns for the calendar year 1924, in which were included their partnership income for the partnership fiscal year ended April 30, 1924, under Sections 1200 and 1201 of Title XII of the Revenue Act of 1924. The respondent contends that the decision of the United States Board of Tax Appeals and the Circuit Court of Appeals for the Second Circuit was right and that Title XII of the Revenue Act of 1924 does not entitle the petitioners in these cases to any deduction.

STATUTES.

The pertinent statutes bearing on the issue in these cases are the following:

Revenue Act of 1924; (43 *Stat.* 275; *United States Code An. Title* 26, *Sec.* 959 (*a*)).

"Sec. 218. (a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed."

This provision is the same in every material respect as Section 218 (a) of the Revenue Act of 1921, and it was enacted without change as Section 218 (a) of the Act of 1926. It was again enacted without substantial change in Sections 181 and 182 (a) of the Revenue Act of 1928.

Revenue Act of 1924; (43 *Stat.* 261, 262; *United States Code An. Title* 26, *Secs.* 938 (*a*) (*b*)).

"Sec. 207. (a) If the taxpayer makes return for a period beginning in one calendar year (hereinafter in this subdivision called 'first calendar year') and ending in the following calendar year (hereinafter in this subdivision called 'second calendar year') and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then his tax under this title for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a tax for the entire period, determined under the law applicable to the first calendar year and at the rates for such year, which the portion of such period falling within the first calendar year is of the entire period; and (2) the same proportion of a tax for the entire period, determined under

the law applicable to the second calendar year and at the rates for such year, which the portion of such period falling within the second calendar year is of the entire period.

(b) If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year."

These provisions are similar in substance to provisions found in Section 205 of the Revenue Act of 1921. They were re-enacted without change as Section 207 (b) of the Revenue Act of 1926 and again as Section 182 (b) of the Revenue Act of 1928.

Revenue Act of 1924; (43 *Stat.* 353-354.)

Title XII—REDUCTION OF INCOME TAX PAYABLE IN 1924.

"Sec. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return."

* * * * * * *

"Sec. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period."

ARGUMENT.

The following arguments and authorities are submitted in support of the contention of the petitioners in these cases that under the provisions of Sections 1200 and 1201 of the Revenue Act of 1924 they are entitled to a deduction of 25% from the tax upon their partnership income for the partnership fiscal year ended April 30, 1924, which accrued in 1923 and which was required under the provisions of the law to be reported by the petitioners in their respective returns for the calendar year 1924.

I.

Statutes Imposing Taxes Should Be Construed According to Certain Well Established Principles.

It is fitting at times to recall and restate even well-established rules and principles, particularly when they relate to fundamental rights of individuals and to their fundamental relations with governmental authority. Such restatement aids us in adhering to those rules and principles and in preventing their being unintentionally overlooked or disregarded. The following are worthy of consideration in this case.

In *Railway Company* v. *Philadelphia,* 101 U. S. 528, 537, Mr. Justice Clifford said:

> "Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. * * * Common burdens should be * * * apportioned, as far as possible, in the ratio of justice and equity".

In *Knowlton* v. *Moore,* 178 U. S. 41, 77, Mr. Justice White said:

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute". (Citing cases).

In *Gould* v. *Gould,* 245 U. S. 151, 153, Mr. Justice McReynolds, in holding that alimony paid under decree of Court was not taxable as income under the income tax law of 1913, said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are *construed most strongly against the Government, and in favor of the citizen.*" (Citing cases.) (Italics ours.)

In *Stockyards Loan Co.* v. *Nichols,* 243 Fed. 511, 516, Munger, D. J., speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"In order to ascertain the intention of the Legislature * * * the Court may look to each part of the statute, to other statutes upon the same or relative subjects, to the old law upon the subject, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation." (Citing numerous cases.)

These are guiding principles in the construction of statutes relating to taxation and are important in the present case. Their bearing upon the following discussion will be obvious.

II.

The Sub-Title of that Portion of the Revenue Act of 1924 Providing the Reduction in Tax is Neither Significant nor Persuasive.

It may be argued on behalf of the Commissioner that the portion of the Revenue Act of 1924, in which these provisions for a reduction in the tax on 1923 income are found, is entitled "Title XII—Reduction of Income Tax Payable in 1924"; and that the provisions for reduction in tax should, therefore, apply only in the case of taxes literally "payable in 1924". The law is clear, however, that the sub-title cannot control the plain language of the sections which follow it. Whatever may be the rule in some of the states, particularly in the West and South, under the provisions of their respective state constitutions, whereby the title of an act must be broad enough to describe somewhat comprehensively the contents of the act, no such rule applies in considering Acts of Congress. Neither the title to an Act of Congress nor any sub-caption or sub-title relating to divisions of such act can be held to control the language of the enactment. The title or sub-title is only one element which may be considered with other surrounding circumstances, in case of a real ambiguity in the language, in order to determine what Congress really meant and intended.

In the early case of *Hadden* v. *Collector*, 5 Wall. 107, the Court said (p. 110):

> "The title of an act furnishes little aid in the construction of its provisions. Originally in the English courts the title was held to be no part of the act:—'No more,' says Lord Holt, 'than the title of a book is part of the book.' It was generally framed by the

Clerk of the House of Parliament, where the act originated, and was intended only as a means of convenient reference. At the present day, the title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.

"These observations apply with special force to acts of Congress. Everyone who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title."

This case was cited in *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72, and the Court says (p. 82):

"It has been observed by this court, that the title of an act, especially in Congressional legislation, furnishes little aid in the construction of it, because the body of the act, in so many cases, has no reference to the matter specified in the title. *Hadden* v. *Collector*, 5 Wall. 110."

In *Sugarland Industries* v. *Bass*, 36 Fed. (2d) 375, (District Court, W. D. Texas, Austin Division), where the question was one of construction of the Revenue Act of 1921, the Court in its opinion says (p. 377):

"Where confusion in the meaning of an act arises out of difference in meaning between the words of the caption and those in the body of the act, effect should be given to the meaning of the words of the act."

In *Meischke-Smith* v. *Wardell*, 286 Fed. 785 (Circuit Court of Appeals, 9th Circuit), the Court in construing an Act of Congress, the sub-title of which was "War Tax

on Facilities Furnished by Public Utilities", said (p. 792):

> "It is next contended by the plaintiffs in error that the sub-title of the statute imposing this war revenue tax limits its scope to public utilities. We do not think it is necessary to resort to the sub-title of this statute for its correct interpretation. When the meaning of an act of Congress is ambiguous, resort may be had to the title, as well as to any other feature of the act, to remove such ambiguities; but when the intent is plain and the language of the statute clear and unambiguous, nothing is left to construction. The cases are numerous in the Federal Courts, as well as elsewhere, supporting this rule, and need not be cited. We think the taxation clause in this statute is perfectly plain and needs no construction to determine *that it is not so limited.*" (Italics ours.)

A writ of certiorari was denied in this case. 263 U. S. 699.

In *Holy Trinity Church* v. *United States*, 143 U. S. 457, where an act of Congress on the subject of the importation and migration of foreigners and aliens under contract to perform labor in the United States was under consideration, the Court says (p. 462):

> "Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, *Hadden* v. *Collector*, 5 Wall. 107, but it may help to interpret its meaning. In the case of *United States* v. *Fisher*, 2 Cranch 358, 386, Chief Justice Marshal said: 'On the influence which the title ought to have in construing the enacting clauses much has been said; and yet it is not easy to discern the point of difference between

the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.'"

The language quoted by the United States Board of Tax Appeals in the *Appeal of Charles Colip*, 5 B. T. A. 123, 126, from the reports of the Senate Finance Committee and of the House Ways and Means Committee contains a sufficient refutation of the argument that the reduction applies only to taxes payable in 1924, for it there appears that the committees estimated that the 25% reduction would reduce the amount of estimated tax receipts for the fiscal year 1925 almost as much as for the fiscal year 1924. These estimates clearly did not assume that the effect of the reduction would cease with the close of the calendar year 1924. A large amount of the taxes on 1923 income would doubtless be payable in the calendar year 1924 and this fact sufficiently accounts for the sub-title. If a reasonable equality between taxpayers requires the act to be interpreted as applying to 1923 income, whether the tax is payable in 1924 or 1925, this sub-title cannot import a sufficient limitation to control that interpretation.

That the provisions of this Title XII were not intended to be strictly limited to taxes payable in 1924 is evident from a consideration of Section 1201 (b), under which any taxpayer making return for a fiscal year

ending in 1924 is given the reduction of 25% on 1923 income. There is no limitation as to the date in 1924 when the fiscal year must end in order to entitle him to that reduction. If his fiscal year had ended November 30, 1924, his return would have been due February 15, 1925 (Revenue Act of 1924, Section 227 (a)) and the tax would have been due on the same date (Section 270 (a) (1)) or in four quarterly installments beginning on that date (Section 270 (b) (1)). In such case the entire payment is due not in 1924 but in 1925, yet there can be no doubt under the plain letter of the statute the taxpayer has the 25% reduction.

Since this sub-title does not restrict the reduction to taxes payable in 1924, it is an indication, it is submitted, of the intention of Congress that all 1923 income regardless of when the tax upon it may have been payable should receive the benefit of the reduction.

III.

Section 1200 (a) of the Revenue Act of 1924 (43 Stat. 353) Entitles the Petitioners to the Reduction They are Seeking.

The rule followed by the United States Board of Tax Appeals in several cases, which presented the issue now before this Court for determination, originated in the *Appeal of Charles Colip*, 5 B. T. A. 123. On the authority of the Colip case, the Board has decided the long list of cases succeeding it without any discussion of the principles involved. The contentions and decision of the Board of Tax Appeals as set forth in the *Appeal of Charles Colip*, supra, has been repudiated by the case of

White v. *Maddison*, 40 Fed. (2d) 564 (United States District Court, D. Massachusetts), which was affirmed by the Circuit Court of Appeals for the First Circuit (45 Fed. (2d) 335), whereas the Court below in the cases now before this Court has affirmed the result reached by the Board (52 Fed. (2d) 17).

It is respectfully submitted that the rule laid down by the United States Board of Tax Appeals in the *Colip* case is erroneous.

At the outset it should be noted that the Board of Tax Appeals in reaching its conclusion in the *Colip* case referred only to the provisions of Section 1200 (a) which by its terms relates to "any taxpayer making return for the calendar year 1923."

In the *Colip* case the Board resorts to an intricate and somewhat confusing discussion of Section 1200 (a) and concludes that under that section the petitioner was not entitled to the 25% reduction with respect to his partnership income accrued in 1923. The only reason for this conclusion apparently was that this partnership income was included in the petitioner's individual return for the calendar year 1924, filed in 1925, instead of being included in a return for an earlier period. Applying this reasoning to the present cases, if these petitioners had kept their personal accounts on a fiscal year basis, said fiscal year ending April 30, 1924; their returns would have been due July 15, 1924 (Revenue Act of 1924, Sec. 227 (a)), and this partnership income for the fiscal year of the partnership ending April 30, 1924, would have been included (Revenue Act of 1924, Sec. 207 (b); supra), or, if their personal fiscal year had ended even on November 30, 1924, their returns would have been due

February 15, 1925, and the same partnership income would have been included; and in either of these cases, we understand the Board would have conceded they were entitled to the 25% reduction on that part of the partnership income accrued in 1923. However, merely because their personal fiscal year was the calendar year 1924 and their individual returns were accordingly filed for that period, *the same partnership income for the same partnership fiscal year ending April 30, 1924, being under the law, included,* yet the reduction is denied them.

The reasoning of the Board in the *Colip* case, it seems, is substantially this, namely, that the income reported in the 1924 calendar year return, including the entire income for the partnership fiscal year ended during the calendar year 1924 (i. e., that which accrued in 1923 as well as that which accrued in 1924) "is all income of the later year", (p. 125); that Section 1200 (a) merely permits the taxpayer "not a retroactive reduction by way of recomputation of the 1923 tax, but a credit or refund of part of the tax assessed or collected upon 1923 returns under the 1921 Act" (p. 126); that the language of the Statute and the "plan of the reduction" are both contrary to the theory that it is in effect a reduction of the rate of tax for 1923 (p. 126). The Board quotes the language of Representative Green in explaining the plan of the Ways and Means Committee bill as finally adopted, as follows:

> "Of course, this flat reduction of 25% is not scientific, but it is something that everyone can understand. Even the man who runs may read this provision and know exactly what it means. He knows he is going to get one fourth off his taxes for this year . . .

> "It would be absolutely impossible at this time when the bill cannot be passed until after a number of parties have already paid their taxes and already made up their returns; and to put in force the system which is provided in the bill would produce utter chaos. There is only one way of getting at it, and that is the way suggested in the bill, by making a simple, flat reduction all the way through. * * *"

and infers, because the method adopted as the means of reducing the 1923 tax was to make a flat reduction of 25% from the tax computed at the rates in the 1921 schedule instead of substituting the reduced rates of the 1924 schedule for those in the 1921 schedule, that Congress did not intend thereby to reduce the 1923 rates (p. 126); that Congress adopted this method of the flat reduction in place of a revision of the 1921 rates as applied to 1923 income in order to prevent "utter chaos"; that the statute does not expressly provide a reduction in tax on 1923 income when that income is returned in an individual calendar year return for 1924; and finally, that the inequality brought about by this conclusion, whereby taxpayers in the situation of these petitioners are denied the reduction in tax on 1923 income "when in all reason the reduction was intended for all" is merely "accidental" and, therefore, not important.

We respectfully submit, that these arguments of the Board are not only quite intricate and confusing but that they are fallacious and cannot be sustained. Representative Green's statement above quoted that they intended to make "a simple flat reduction all the way through" so that "the man who runs may read this provision and know exactly what it means" indicates, to a mind searching for the practical intention of Congress and not dis-

posed to allow fine technicalities to obscure that intention, a purpose to make a "flat reduction" *with respect to the tax on* 1923 *income.*

The conclusion indicated by the Board of Tax Appeals that the entire income for the partnership fiscal year ended during 1924 "is all income of the later year", i. e. of 1924, is both surprising and unnecessary. In the first place it is quite inconsistent with the general understanding that as matter of law partnership income accrues to the individual partners as it is earned. A partnership is not a legal entity but is merely an aggregation of individuals under an express or implied agreement. The times of distribution of profits may be regulated by the terms of the agreement but those profits as they are earned necessarily accrue to the individuals in the proportions agreed upon between them, and to no one else. This is recognized by all the Revenue Acts here under consideration, in the provision that partners are *liable to income tax only as individuals.* Moreover, the idea that the Revenue Act makes the income of the partnership which accrued in 1923 technically income for the year 1924 for income tax purposes is inconsistent with the very statutory provisions we are discussing, because those provisions carefully distinguish between 1923 income and 1924 income and apply a special reduction in the tax on the 1923 income. If we attempt to apply this reasoning to the case of an individual making a fiscal year return—say for the fiscal year ending May 30, 1924—the doctrine argued by the Board would have to be stated thus, namely: that the entire income of the partnership fiscal year ended April 30, 1924 is all income of the individual's fiscal year ended May 30, 1924. This

statement obviously is meaningless; and we are therefore forced to conclude that income of 1923 remains income of 1923 and is not by some legal manipulation transmuted into income of 1924. It would be indeed strange if we were obliged to conclude that income accrued in 1923 is sometimes to be taxed at one rate and sometimes at another rate. The method prescribed by the Revenue Act of 1924 for including in a personal return of income the income received from a partnership was enacted, it is submitted, for purposes of convenience only because it obviates the necessity of filing two returns, one for partnership income and one for income received from other sources.

We hardly need mention that we are not arguing against the proportionate method adopted by Congress in Section 207 (b) for determining how much of the income accrued in 1923 and how much in 1924. We have no quarrel with the view of the Board of Tax Appeals to the effect that the apportionment of income to the respective calendar years in the ratio of the parts of the fiscal year which fall in those respective calendar years is entirely reasonable. We submit, however, that it is *not* reasonable, when once those proportions have been determined, to conclude that the income thus allocated to 1923 and presumably earned during that year should be taxed at 1924 rates, and should not have the benefit of the reduced rates which are prescribed for 1923, or to discriminate between taxpayers with respect to the tax on their 1923 income merely because they returned that income in a return filed on March 15, 1925, instead of in a return filed December 15, 1924 or February 15, 1925; and it seems a fair conclusion that neither Representa-

tive Green nor the Committee which he represented, when they were trying to devise a simple method for giving the taxpayers relief with respect to the tax on their 1923 income, which he who ran might read, had in mind any such distinction.

The inequality and unfairness of the result reached by the Board of Tax Appeals is apparent. We could hardly have a better example of this than the case suggested in the preceding paragraph. If the petitioners' individual fiscal year had ended November 30, 1924, they would clearly have been entitled to the reduction on this 1923 partnership income, even though their returns need not be filed until February 15, 1925, and their taxes were not due until that date, but since their individual fiscal year ended on December 31, 1924, thus corresponding with the calendar year, instead of on November 30, 1924, the same partnership income being included in either case, the rule laid down by the Board would deny them the reduction.

The Revenue Act of 1924 did not become law until June 2, 1924. At that date returns for the calendar year 1923, as also returns for fiscal years ending January 31, 1924 and February 29, 1924, would already have been filed and it was obviously much simpler and much less confusing to permit a flat 25% reduction in the tax as computed under the 1921 rate schedules instead of recomputing the tax under a new rate schedule. This being so, it was only natural to apply this same simple method of rate reduction for 1923 income to other taxpayers whose returns covering income part of which accrued in 1923 might be due on various later dates. If the reduction in the 1923 tax was to be extended to other taxpayers be-

sides those who had already filed their returns (and under the principles of equality it must be so extended) it was only logical to follow the same method of computation, namely, to compute the tax on 1923 income at the old 1921 rates in all cases and then apply the flat 25% reduction.

But the fact that this reduction in the tax on 1923 income was effected by first computing the tax at the old 1921 schedule of "rates" and then reducing the result by 25% does not mean that the *rate of tax* on 1923 income was not reduced—it clearly *was* reduced and the method adopted to bring about this result has to do only with the *method of computing the reduction.* "The man who runs" would so understand it and from any practical point of view any other conclusion seems quite unreasonable. He would understand, and properly so, that the rate of tax he must pay on 1923 income was reduced 25%.

This particular plan of reducing the rate of the tax which must be paid on 1923 income was adopted, as Representative Green stated, for practical reasons and we submit that the Board is reasoning inaccurately and fallaciously when it says that this plan of reduction is inconsistent with the idea that the rate of tax on 1923 income was being reduced. Certainly the application of this 25% reduction to all 1923 income whenever and however returned for tax, will bring about no "chaos" but only *equality* between taxpayers. Notwithstanding the fact that, with regard to returns already filed when the 1924 Act was adopted on June 2, 1924, the reduction necessarily required a credit or refund, it was nevertheless a "retroactive reduction by way of recomputation

of the 1923 tax" even though the reduction was computed by this simple practical method. As to taxes which had not then been paid, the 25% reduction from the amount otherwise shown by the return fixed the limit of the tax which was due; and all who made returns after the Act was adopted would properly show the reduced amount as the total amount of their tax. No taxpayer who had not paid was required to pay the full amount based on the old rates and then seek a credit or refund.

Even the Court below repudiates the position of the Board of Tax Appeals that the Revenue Act of 1924 did not effect a reduction of the rate of tax for 1923, when it says in its opinion at page 18: "By the Revenue Act of 1924 rates for income taxes were greatly reduced."

It seems hardly an answer to the suggestion that the conclusion reached by the Board will result in unequal treatment of taxpayers in the tax on their 1923 income, *based merely upon the time when their returns which include that income are filed,* to say that such inequality is "accidental", when another sensible interpretation of the statute will avoid that inequality. The interpretation adopted in the case of *Maddison* v. *White* (United States District Court, D. Massachusetts) 40 Fed. (2d) 564, affirmed by the Circuit Court of Appeals for the First Circuit (45 Fed. (2d) 335), does this and gives effect to what must undoubtedly have been the intention of Congress, that is, to treat all taxpayers alike with respect to their 1923 income.

It is respectfully submitted, therefore, that on the basis of the arguments above set out the rule established and followed by the Board of Tax Appeals cannot be sustained. It results in grave inequalities which are not the

result of any reasonable classification, but which depend merely on the particular time when the taxpayer's return which included his 1923 income was filed, and when his tax thereon was due.

The Court below also states that Section 1200 (a) does not afford the petitioners the relief which they ask, because it relates only to a taxpayer making a return for the calendar year 1923 and to show that no injustice results from this literal construction of that section it points out that under it the petitioners were entitled to a 25% deduction upon income of their partnership accruing during that part of the partnership fiscal year which fell within the calendar year 1922.

The answer to this position of the Court below is, first, that it has never been decided by any Court that Section 1200 (a) entitled a taxpayer to a 25% deduction upon partnership income accruing during that part of the partnership fiscal year which fell within the calendar year 1922. Of course, if the Department saw fit to allow such a deduction, it is hardly likely that a taxpayer would object, especially at a time when the rates were as high as those imposed by the Revenue Act of 1921. But that does not mean that Congress ever intended it and it does not seem that such a deduction should be allowed under Section 1200 (a). Second, that the case of *White* v. *Maddison* (Circuit Court of Appeals First Circuit), 45 Fed. (2d) 335, construes Section 1200 (a) in a manner which makes any such deduction impossible. By spelling out what the Court in that case considered to have been the intent of Congress, Section 1200 (a) is made to read as follows:

"Sec. 1200 (a) Any taxpayer making return for (income accruing in) the calendar year 1923 (though determinable in a later year), of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return."

Construed in this manner the section makes no allowance for a deduction upon 1922 income. Third, the Court below, itself, is forced to admit that such a construction results in hardship. At page 20 of its opinion, the Court below says:

"There may be individual hardships, and a firm which did not exist in 1922 and began business in 1923 would be unable to obtain any refund under the remedial provisions of the Acts of 1924."

On the other hand, these instances of hardship can be entirely eliminated by construing Section 1200 (a) in the manner suggested either in *White* v. *Maddison,* supra, or in *Maddison* v. *White,* supra, which will entitle every individual, who made his return of income for 1924 on a calendar year basis and included therein his partnership income for a period which began in 1923 and ended in 1924, to the reduction provided for therein. Such a construction would, it is submitted, be in accord with the purpose which Congress intended to accomplish, as indicated by a wording of the provisions of Title XII of the Revenue Act of 1924, apart from the other provisions of the Act which other provisions, it is submitted, were not in the mind of Congress when Title XII was enacted for the reason that it was concerned only with granting relief to everyone from the high rates established by the Revenue Act of 1921, in a simple yet practical manner

and which intention was manifested by Representative Green when he said, "Of course, this flat reduction of 25% is not scientific, but is something that everyone can understand."

IV.

Section 1201 (b) of the Revenue Act of 1924 (43 Stat. 354), Entitles the Petitioners to the Reduction They are Seeking Because, as to Their Partnership Income, They Made a Return for "a Period Beginning in 1923 and Ending in 1924".

Whatever may be the merits of the case under Section 1200 (a) there is ample opportunity under Section 1201 (b) to reach the equitable result for which the petitioners are contending.

In the first place it is evident under Section 1201 that Congress did not intend to limit the reduction in the 1923 tax to cases where the 1923 income was reported for the calendar year as a whole. The intention was to apply the reduction generally to 1923 income *in all cases where returns included fiscal periods falling in part within the calendar year* 1923. In all such cases under Section 1201 the applicable rates of tax were made subject to the 25% reduction.

Again, under the express provisions of Section 218 (a), the taxpayers were *required* to include in their personal returns, which were filed on the calendar year basis, their "distributive share of the net income of the partnership for" the partnership fiscal year ended April 30, 1924. Can any other conclusion fairly be reached, therefore, but that the taxpayers, in so far as their partner-

ship income was concerned, *were making their returns "for a period beginning in* 1923 *and ending in* 1924"? Because of the accidental fact that their individual accounting period happened to be the calendar year, their returns of the partnership income for the fiscal year ended April 30, 1924, were made on March 15, 1925. If their individual accounting period had been the fiscal year ending April 30, 1924, or November 30, 1924, their returns would have been due July 15, 1924, or February 15, 1925. But the partnership income would have been the same in either case, namely, their "distributive share, whether distributed or not, of the net income of the partnership for" the fiscal year ended April 30, 1924. Although their returns were filed on March 15, 1925, and although they were made, so far as their *individual income* was concerned, for the calendar year 1924, yet so far as the *partnership income* was concerned, it was necessarily and truly, made "for a period beginning in 1923 and ending in 1924".

It is contended by the Court below, however, that Section 1201 (b) does not entitle the petitioners to the reduction therein provided because as it says in its opinion at page 19,

> "Sec. 1201 (b) is not applicable to a case where partnership income, and not the tax, is allocated between separate years as provided in the case of partnerships by Section 207 (b)."

That is to say, Sections 1201 (b) and 207 (b) prescribe different methods of computing taxes and for that reason cannot apply to the same income.

It is respectfully submitted that it does not follow from this observation of the Court below that the peti-

tioners are not entitled to the reduction provided by Section 1201 (b). Section 207 (b) is similar in substance to provisions found in Section 205 of the Revenue Act of 1921. They were re-enacted without change in Section 207 (b) of the Revenue Act of 1926, and again at Section 182 (b) of the Revenue Act of 1928. Thus, it appears that the substance of Section 207 (b) of the Revenue Act of 1924 has consistently appeared in many of the Revenue Acts. On the other hand, the same thing cannot be said of Section 1201 (b) of the Revenue Act of 1924, and the reason for this is that it was enacted by Congress to accomplish a special purpose at a special time, namely, to reduce the then existing rates on income which accrued in 1923, and thus, to give the benefit of the surplus in the treasury to the taxpayers. It is respectfully submitted, therefore, that in enacting Section 1201 (b) it was not the intention of Congress that it apply to taxpayers such as the petitioners in conjunction with Section 207 (b), but rather to apply to them apart from Section 207 (b) and without relation thereto.

V.

As the Effect of Sections 1200 and 1201 of the Revenue Act of 1924 was to Reduce the Final Rates for 1923, Section 207 (b) of the Same Act Clearly Applies and the Petitioners' Tax on 1923 Income Must Be Computed at the Reduced Rate.

It has been argued at some length that the Board of Tax Appeals was wrong in concluding that Congress in the 1924 Act did not intend to reduce the 1923 rates; that in fact and in legal intendment the whole purport

and effect of Sections 1200 and 1201 was to reduce by 25% the rates which were previously in effect for 1923; that under those Sections the reduction of 25% is given as to 1923 income *in all cases,*—not only where such income is returned in a calendar year return independent of other years, but also where such income is returned as part of some fiscal period falling in part in 1923. The same reduction is extended by Section 1202 to all 1923 income where it is included in a return for a period of less than a year "and beginning and ending within the calendar year 1923".

If this interpretation is correct, then it seems to follow that the petitioners are clearly entitled to relief under Section 207 (b). Sections 1200 to 1202 inclusive provided the method of dealing with the reduction in the cases specifically mentioned in those Sections but Section 207 (b) is the Section which specifically prescribes how the tax on partnership income shall be computed where the fiscal year of the partnership begins in one calendar year and ends in another. Under that section, where the partnership fiscal year began in 1923 and ended in 1924 that part of the partnership profits accruing in 1923 is made subject to tax at "the rates for the calendar year during which such fiscal year begins". To the ordinary understanding it would seem to require no argument that in the final result the income allocated to the calendar year 1923 must be taxed at the rates which are made *finally effective for that year* and that the rates which by the Revenue Act of 1924 were made finally effective for 1923 were 25% less than the rates prescribed in the 1921 schedules. There is surely no implication in Section 207 (b) that the application of

these final rates to 1923 income was to depend on *when this income was returned* by the individual partner.

The final rates for 1923 having been reduced by 25% the petitioners were right under Section 207 (b) in taking the deduction of that amount on their returns.

VI.

The Decision of the Court Below is Erroneous.

The reasons for the decision of the Court below may be summarized in the Court's own language where, at pages 18 and 19 of its opinion, it says:

> "We think it clear that none of the statutory provisions just quoted afford appellants the relief which they ask. Section 1200 (a) does not, for it only relates to a taxpayer making a return for the calendar year 1923, and Stewart and Shearer each made a return for the calendar year 1924. • • •"
>
> "Section 1201 (a) applies only to a taxpayer making a return for a period beginning in 1922 and ending in 1923. • • •"
>
> "Section 1201 (b) applies to a taxpayer making a return for a period beginning in 1923 and ending in 1924. The appellants were not making a return for such a period, but for the calendar year 1924. By its terms, section 1201 (b), as section 1201 (a), relates only to taxpayers reporting income for a fiscal year different from a calendar year—a situation not involved here. Section 1201 (a) covers only cases where a taxpayer, not a partner, is reporting income under section 207 (a) for a fiscal year. Under section 207 (a) section 1201 (b) deducts 25 per cent. from the proportion of the tax allotted under section 207 (a) to 1923. Section 1201 (b) is not applicable to a case

where partnership income, and not the tax, is allocated between separate years as provided in the case of partnerships by section 207 (b)."

In other words, the Court below holds that Sections 1201 (a) and 1201 (b) apply only to cases where the taxpayer, "not a partner" is reporting income under Section 207 (a) for a split fiscal year and since Section 207 (b) provides a different method for arriving at the tax than Sections 1201 (a) and 1201 (b), that neither of these latter sections have any application to partnership income.

What is the result of such a decision? If Sections 1201 (a) and 1201 (b) have no application to partnership income, it means that Section 1200 (a) is the only section which has such application. But the Court below holds that Section 1200 (a) applies only to those cases in which a return is made for the calendar year 1923 in the strictest sense of the words. If that is so, then no taxpayer, who is a member of a partnership, is entitled to a reduction under the Revenue Act of 1924, unless he made his 1923 return of income upon a calendar year basis. The Court below would not permit any taxpayer who made his return in 1923 or 1924 on a split fiscal year basis and included therein his partnership income to take any deduction under the Revenue Act of 1924 because to be consistent it would have to hold, first, that Section 1200 (a) would not apply for the reason that "it only relates to a taxpayer making a return for the calendar year 1923", and, second, that Sections 1201 (a) and 1201 (b) do not apply to Section 207 (b) which in turn deals with the method of calculating the tax on partnership income. That is, no taxpayer whose part-

nership income was included in his individual return for a split fiscal year ending in 1923 or 1924 would be entitled to the reduction provided by Title XII of the Revenue Act of 1924, because, as the Court below says in its opinion at pages 19 and 20:

> "The refund provided under Sections 1201 (a) and 1201 (b) is based upon a tax computed under Section 207 (a), because Sections 1201 (a) and 1201 (b) allow a refund on the 'proportion' of the tax for the entire fiscal year which the portion of the fiscal year falling within 1923 bears to the entire period. Such a 'proportion' of the tax is employed only in Section 207 (a). It has no relation to Section 207 (b) by which the 'income', and not a 'proportion' of the tax, is allocated between separate years. Therefore, a refund of 25 per cent. of the amount which is placed in the higher brackets under Section 207 (b) finds no warrant in the statute."

Such a result as that reached by the Court below when applied to an individual making his return of income upon a split fiscal year basis could not have been intended by Congress. Therefore, the very reasons which the Court below gives for denying the relief to the petitioners and which are advanced as insurmountable obstacles to the deduction they are seeking, show, it is submitted, that the result reached by the Court below is erroneous, and that the deduction should be allowed.

CONCLUSION.

In accordance with the arguments above set forth, it is respectfully submitted that the decision of the United States Circuit Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

BURTON E. EAMES
R. GAYNOR WELLINGS
Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

Nos. 469 and 470.—October Term, 1931.

469	George L. Shearer, Petitioner, *vs.* David Burnet, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
470	William A. W. Stewart, Petitioner, *vs.* David Burnet, Commissioner of Internal Revenue.	

[March 14, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

The petitioners in these cases, members of a law partnership, filed their individual tax returns for the calendar year 1924. The partnership books were kept on the basis of a fiscal year and the partnership information return, filed in 1924, was for the fiscal year ending April 30th of that year. As required by § 218 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 275, the petitioners included in their individual returns their respective shares of the partnership profits for the partnership year ending in 1924. They thus returned, as 1924 income, partnership profits attributable to eight months of the previous year.

In assessing the tax, the Commissioner rejected their claim that, under the provisions of Title XII of the Revenue Act of 1924, they were entitled to a reduction of 25% of the tax at 1923 rates on that portion of their respective shares of the partnership income attributable to the eight months of the partnership year, which fell in the calendar year 1923, and found deficiencies accordingly. The orders of the Board of Tax Appeals sustaining the action of the Commissioner, 18 B. T. A. 393, were affirmed by the Court of Appeals for the Second Circuit. 52 F. (2d) 17. This Court granted certiorari, 284 U. S. —, to resolve a conflict between the

decision below and that of the Court of Appeals for the First Circuit, in *White* v. *Maddison*, 45 F. (2d) 335.

The provisions of Title XII of the Revenue Act of 1924 embody a comprehensive scheme for relieving taxpayers from the burdens of the higher rates applicable to 1923 income under the 1921 Act. The 1924 Act reduced the rates, but became a law too late in the year to make them readily applicable to income earned in the previous year. Instead, it adopted the less scientific, but more convenient, plan of a level reduction of 25% of the tax. In making it, Congress was careful to limit the reduction to taxes on income returned for 1923. The applicable provisions are found in §§ 1200 (a) and 1201 (a) and (b) of the 1924 Act.[1] Section 1200 (a) authorized the allowance to taxpayers making a return of income for the calendar year 1923. Section 1201 (a) and (b) granted it to taxpayers returning income for a fiscal year beginning or ending in 1923, but only with respect to the tax on so much of the income returned as was attributable to income earned in the calendar year 1923.

Petitioners' claims for the allowance plainly are not comprehended by the language of either section. They made their returns on the calendar year basis, and were entitled to, and presumably received, the allowance authorized by § 1200 (a) upon the tax on income returned for the calendar year 1923. But this sec-

[1] "Sec. 1200 (a). Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

"Sec. 1201 (a). Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period."

tion does not authorize any reduction of the tax upon income returned for the calendar year 1924, as was that of petitioners. Section 1201 (a) and (b) applies only to taxpayers returning income for a fiscal year beginning or ending in 1923. The petitioners, who made no such returns, were thus excluded from the benefits of the 25% reduction of the tax on any part of their income returned for the calendar year 1924 by the unambiguous language of these sections. See *Crooks* v. *Harrelson,* 282 U. S. 55, 60, 61.

They argue that the provisions of these sections applicable to income returned for 1923, evidence a general purpose to allow the reduction of tax upon any income attributable to that year. Hence, despite the language of § 1201 (b) restricting its benefits to those returning income for taxation for some part of the year 1923, they insist that it should be deemed to extend to taxes on partnership income attributable to 1923, although in fact income in 1924, and returned by the taxpayers as such in their 1924 returns.

Even if there were room for construction of the words of the statute, it is impossible to discern any such general purpose underlying the 1924 Act as would support petitioners' contention. There are two insuperable obstacles to the construction urged. The first is the necessary effect of § 1200 (a) when applied to returns of taxpayers for the calendar year 1923. That section authorizes a reduction of 25% of the taxes for 1923 upon all income, including that derived from partnerships having a fiscal year beginning in 1922 and ending in 1923. Thus applied, it allows 25% reduction of petitioners' 1923 tax, including that upon their partnership income, attributable to eight months of 1922. If, as they insist, § 1201 (b) is to be construed as permitting a like reduction of the 1924 tax on partnership income attributable to the last eight months of the calendar year 1923, which overlapped the partnership year ending in 1924, petitioners, despite the careful limitation of the reduction to taxes upon income for a single year, would be entitled to a reduction of the tax on partnership income for a period of more than a year, in this case twenty months, eight months of 1922 and the full twelve months of 1923.

A second objection to the suggested construction of § 1201 (b) is that if the reduction, for which it provides, were extended to the tax involved here, it would not necessarily result in a return of 25% of the tax assessed, as is the obvious purpose of the section.

Section 1201 (a) and (b), allows the 25% reduction on that proportion of the tax for the entire year, computed at 1923 rates, which the period of the fiscal year falling within the calendar year 1923 bears to the entire taxable year. As this is the same basis on which the tax is computed under § 207 (a) of the 1924 Act, where the taxable year begins in 1923 and ends in 1924, the reduction is exactly 25% of the tax assessed.

A different method of computing the tax on a distributive share of partnership income for a partnership fiscal year beginning in 1923 and ending in 1924, is prescribed by § 207 (b) of the 1924 Act. Under that section the tax computed for the fiscal year at 1923 rates is not, as under § 207 (a), apportioned to the number of months of the fiscal year which fall in the calendar year 1923. Instead, § 207 (b) applies the 1923 schedule of rates to the income apportioned to 1923, and the 1924 schedule to the income apportioned to 1924. And for purposes of the surtax it places the income from the partnership subject to the 1924 rates in the lower brackets and the income subject to the 1923 rates in the higher brackets.

The difference in method of calculating the tax on the two classes of income may produce different amounts of tax on the same amount of income. The tax computed under § 207 (a) upon income of an individual taxpayer attributable to the first eight months of a fiscal year ending April 30, 1924, would be exactly two-thirds of the total tax, and it is to the two-thirds of this total to which the 25% reduction is applied by § 1201 (b). If applicable to the present case, the reduction would likewise be allowed on two-thirds of the tax for the entire year at 1923 rates. But the tax calculated under § 207 (b), on income derived from the partnership, for the same eight months of 1923, would be more than two-thirds of the total tax for the year, because of the higher rate of surtax applicable to the income attributed to 1923 than to the income apportioned to 1924.

The reduction of the tax calculated as prescribed by § 1201 (b) would accordingly not be 25% of the tax. The section, if construed to extend the reduction to a tax computed as was the petitioners', would thus depart from the obvious purpose and definite scheme of the 1924 Act to return uniformly to taxpayers 25% of the tax on income of a single year. Undoubtedly Congress might have included the tax on this income of petitioners in its scheme for

refunding taxes. Its failure to do so is doubtless a consequence of the fact already noted that it did make provision for reduction of the like tax on the income for the corresponding months of 1922.

Assuming that petitioners can invoke the protection of the Fifth Amendment to secure an equable share of a credit or refund of a tax after its assessment, we can discern in this statute no want of due process of law. The petitioners are within a defined class which Congress clearly had power to select for purposes of a tax refund. See *La Belle Iron Works* v. *United States*, 256 U. S. 377, 392; *Billings* v. *United States*, 232 U. S. 261, 282; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. They cannot complain of the possibly unequal operation of the statute on others less favorably situated. *Heald* v. *District of Columbia*, 259 U. S. 114, 123.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.